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2957 No. 15005

United States
Court of Appeals
For the Ninth Circuit

See Vol. 2958

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 432)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-13-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern District of California, Central Division

No. 14350T

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Plaintiffs,

vs.

L. D. REEDER COMPANY, R. E. HOWARD COMPANY, DIAMOND HEAD SCREW CORP., Formerly Known as JOSEPH, INC., Formerly Known as THE HAROLD E. SHUGART COMPANY, INC., Formerly Known as HAROLD E. SHUGART COMPANY, INC., R. W. DOWNER COMPANY, COAST INSULATING PRODUCTS, A. D. HOPPE Doing Business Under the Fictitious Name and Style of THE SOUND CONTROL COMPANY, PAUL H. DENTON, Doing Business as THE PAUL H. DENTON CO., CARROLL DUNCAN, Doing Business Under the Firm Name and Style of ACOUSTICS, INC., L. D. REEDER, R. E. HOWARD, G. H. MORRIS, ROY DOWNER, JR., CHARLES L. NEWPORT, GUS CROUSE, ACOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC. (Formerly Known as ACOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.), THE FLINTKOTE COMPANY, FIRST DOE, SECOND DOE, THIRD DOE, and FOURTH DOE,

Defendants.

COMPLAINT

(Under Sherman Antitrust Act)

The above-named plaintiffs complain of the above-named defendants, and each of them, and allege as follows:

I.

Jurisdiction

1.

The causes of action in this complaint arise under the laws for the protection of trade and commerce against restraints and monopolies, and more particularly under the provisions of law contained in Title 15 of the United States Code, including Sections 1, 2, and 7 of the Act of Congress known as the Sherman Act, and Sections 4, 5, 12, and 16 of the Act of Congress known as the Clayton Act (15 U.S.C.A. secs. 1, 2, 15, 16, 22, 26; 26 Stat. 209, 26 Stat. 210, 38 Stat. 731, 38 Stat. 736, 38 Stat. 737).

2.

The purpose of this action is to recover three-fold the damages sustained by plaintiffs, plus reasonable attorney's fees and costs of suit, caused by defendants' illegal, monopolistic practices and restraints of trade and commerce, particularly as affecting plaintiffs, all as more fully set forth herein, for an injunction to restrain said illegal acts in the future, and for such other and further relief to which plaintiffs may be entitled.

II.

Plaintiffs

3.

The plaintiffs, Walter R. Waldron and Elmer Lysfjord, are residents of the City and County of Los Angeles, State of California, and since in or about January, 1952, have been engaged in the business of rendering an acoustical tile contracting service under the fictitious firm name and style of "aabeta co." and have maintained principal offices and conducted said business in the City and County of Los Angeles, California, and in the City and County of San Bernardino, California.

III.

Defendants

4.

The defendants, L. D. Reeder Company, R. E. Howard Company, Diamond Head Screw Corp., R. E. Downer Company, Coast Insulating Products, A. D. Hoppe, Paul H. Denton, and Carroll Duncan, during all of the times named herein have been and now are engaged in the business of purchasing, distributing, installing, and contracting for the installation and sale of acoustical tile in the State of California, and each said defendant conducts said business in the City and County of Los Angeles, State of California, and regularly maintains an office and principal place of doing business in said City, County, and State.

5.

L. D. Reeder was, during all of the times mentioned herein, an officer, director and managing executive of the defendant L. D. Reeder Company, and during all of said times actively participated as such in the illegal acts complained of herein.

6.

R. E. Howard was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant R. E. Howard Company, and during all of said times actively participated as such in the illegal acts complained of herein.

7.

G. H. Morris was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Diamond Head Screw Corp., and during all of said times actively participated as such in the illegal acts complained of herein.

8.

Roy Downer, Jr., was, during all of the times mentioned herein, an officer, director and managing executive of the defendant R. W. Downer Company, and during all of said times actively participated as such in the illegal acts complained of herein.

9.

Charles L. Newport was, during all of the times mentioned herein, an officer, director and managing executive of the defendant Coast Insulating Products, and during all of said times actively partici-

pated as such in the illegal acts complained of herein.

10.

Gus Crouse was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Coast Insulating Products, and during all of said times actively participated as such in the illegal acts complained of herein.

11.

Plaintiffs are unaware of the true names or capacities of the defendants First Doe, Second Doe, Third Doe, and Fourth Doe, and therefore sue said defendants by such fictitious names and pray that their names and capacities, when ascertained, may be incorporated herein by appropriate amendments to this complaint.

12.

Acoustical Contractors Association of Southern California, Inc. (hereinafter referred to as The Association) is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of Los Angeles, State of California, and has as its members all of the foregoing named defendants.

13.

In addition to the foregoing capacities and since December 10, 1951 (the date upon which the defendant "Acoustical Contractors Association of Southern California, Inc." was incorporated), the

uary 1, 1952, been sold exclusively by all manufacturers to a limited number of tile contractors in the Los Angeles competitive area and elsewhere in the State of California. In the Los Angeles competitive area said tile has been sold only to members of the defendant, The Association, excepting the period of January 1, 1952, to in or about March, 1952, when Flintkote sold such tile to plaintiffs, as will be hereinafter described.

V.

Violations of Law

16.

For some time prior to the date of the filing of this complaint and continuously since prior to January 1, 1951, the defendants herein, with the exception of Flintkote, well-knowing all of the foregoing facts have been engaged in a combination and conspiracy to restrain and to monopolize trade and commerce in acoustical tile in violation of the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." The general plan and purpose of said combination and conspiracy was that said defendants would eliminate competition among themselves and monopolize the sale and installation of acoustical tile by agreeing with each other:

1. To maintain and adhere to non-competitive prices to be charged and non-competitive terms and conditions of sale allowed various types of purchasers for acoustical tile and the installation thereof.

2. To refrain from competing with each other in the sale and installation of acoustical tile.

3. To allocate the sale and installation of acoustical tile among members of the defendant, The Association, in accordance with an allocation system and agreement among such members of The Association rather than upon the basis of open and competitive bids and negotiations.

4. To exclude non-member acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile in Los Angeles and surrounding areas by use of the following means among others:

(a) By boycotting, threatening to boycott, and otherwise coercing manufacturers of acoustical tile to limit the sale of their product to members of the defendant, The Association, in areas where said members are located or do business.

(b) By concertedly entering inordinately low bids for jobs on which is was ascertained by said defendants that a non-member acoustical tile contractor was bidding or negotiating.

5. By associating and acting concertedly with one another throughout the period named herein for the purpose of effectuating the objects and purposes set forth hereinabove.

VI.

Acts Done in Furtherance of the Illegal Restraints and Monopolies

17.

At all times since prior to January 1, 1951, defendants have done and performed each and all of the acts necessary to accomplish the objects and purposes of the conspiracy combination, and agreements hereinbefore set out in paragraph 16 above.

VII.

Effect of Defendants' Illegal Acts Upon Plaintiffs' Business

18.

The unlawful restraints, monopolies, contracts, understandings, combinations and conspiracies of the defendants as herein described have had and now have, as intended by the defendants, the following injurious effects upon plaintiffs' property and the operation of their said acoustical tile contracting business in the City and County of Los Angeles, State of California, and in the City and County of San Bernardino, State of California:

(a) Prior to January 1, 1952, plaintiffs entered into an agreement with the defendant Flintkote for a continuous supply of a complete line of acoustical tile products manufactured and sold by said defendant. In reliance upon said agreement plaintiffs lease warehouses and office accommodations in the City and County of Los Angeles and in the City

and County of San Bernardino, all in the State of California, in which to conduct and carry on an acoustical tile contracting business. For many years prior to January 1, 1952, the defendant Flintkote had supplied and has continued to supply its acoustical tile products to two or more members of the defendant, The Association, doing business in the County of Los Angeles and elsewhere in the State of California. Plaintiffs commenced receiving regular shipments of acoustical tile from the defendant Flintkote, in accordance with said agreement, in or about January 1, 1952, and continued to receive said shipments and place orders for additional shipments until in or about March, 1952. During this period of approximately three months or more plaintiffs were successful in establishing a profitable, substantial, and constantly expanding acoustical tile contracting business in Los Angeles and San Bernardino Counties in the State of California, and obtained and performed a large number of contracts to supply and install acoustical tile in said areas in competition with the defendant tile contractors named herein.

In or about March, 1952, and solely because of the active and successful competition of plaintiffs with members of the defendant, The Association, and the effect of such competition on the illegal, non-competitive price fixing policies and activities of said members, the defendant Flintkote was induced to terminate its agreement to supply plaintiffs with acoustical tile products by reason and

because of the concerted action and coercion exerted upon said defendant by members of the defendant, The Association, in the form of threats to boycott Flintkote products in the Los Angeles area and elsewhere in the State of California by said defendants in the event Flintkote continued supplying said products to plaintiffs. As a sole and direct result of said concerted action, threats of boycott, and coercion Flintkote did in fact, in or about March, 1952, refuse to accept further orders for acoustical tile products from plaintiffs and did terminate its agreement with plaintiffs. As a sole and direct result of said acts of the defendants, plaintiffs have been damaged in their property and business as follows:

(1) Members of the defendant, The Association, have by their said acts monopolized all sources of supply of acoustical tile available for use in Los Angeles County and elsewhere in the State of California to the exclusion of plaintiffs herein as a result of which plaintiffs have sustained and will sustain and will continue to sustain the following damages:

(aa) Having been so deprived of their only available source of supply with which to carry on their business plaintiffs have been, are, and will continue to be unable to bid upon or compete with defendants in connection with any substantial amount of business whereby and because of which fact plaintiffs' business and their ability to carry on the same has been drastically and substantially reduced.

(bb) By reason of being deprived of their source of supply, the good will created by plaintiffs over a period of years of association with building contractors (who award contracts to acoustical tile contractors) has been and is being destroyed at a progressively rapid rate;

(cc) Plaintiffs have, as a result of the illegal acts complained of herein, been compelled to vacate their business facilities in San Bernardino County, State of California, upon which they must and do, under the terms of a binding lease, continue to pay substantial rent;

(dd) When the limited inventory of acoustical tile now belonging to plaintiffs is consumed, plaintiffs will be compelled to terminate and discontinue their business altogether.

(ee) By reason of all of the foregoing facts, plaintiffs have been damaged in a sum of not less than $75,000.00.

(ff) By reason of defendants' use of a member of defendant, The Association, as a "fighting company" in connection with acoustical tile contracts in which plaintiffs were interested, plaintiffs have been and will continue to be deprived of such business which would otherwise have gone to them; that is to say, the defendants have sought out and inquired concerning those acoustical contracting jobs in which plaintiffs have submitted a bid or for which they were negotiating and have delegated one of their number to submit an inordinately and

arbitrarily low bid in such instances for the sole purpose of depriving plaintiffs of business and profits which they would otherwise have received and for the ultimate purpose of driving plaintiffs out of business entirely.

19.

Unless the defendants, and each of them, are restrained and enjoined from continuing their unlawful practices herein alleged, plaintiffs will continue to suffer substantial additional losses of profits and other damages hereinbefore set forth, and, therefore, plaintiffs will at the appropriate time ask permission of this Honorable Court to supplement the instant complaint to cover damages suffered subsequent to the filing of this complaint.

Wherefore, plaintiffs pray:

(1) That the conspiracy, conspiracies, combination, combinations, contracts, and agreements hereinbefore described and the acts taken to effectuate their purposes be declared by this Court to be illegal and in violation of the Sherman Antitrust Act, Sections 1 and 2 (15 U.S.C.A., Secs. 1 and 2);

(2) For judgment against the defendants, and each of them, and in favor of the plaintiffs in the sum of $225,000.00, being three-fold the damages sustained by plaintiffs as a result of the matters complained of herein;

(3) For judgment against the defendants, and each of them, for costs of suit and reasonable at-

torneys' fees pursuant to the laws of the United States as provided in such cases;

(4) That the defendants, and each of them, be enjoined from continuing each and all of the unlawful acts and practices herein set forth; and

(5) For such other and further relief as to the Court shall seem just and equitable.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

Plaintiffs hereby demand a jury trial of the issues involved in this action.

Duly verified.

Amended March 23, 1953.

[Endorsed]: Filed July 21, 1952.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT
(Under Sherman Antitrust Act)

The above-named plaintiffs complain of the above-named defendants, and each of them, and allege as follows:

I.

Jurisdiction

1.

The causes of action in this complaint arise under thelaws for the protection of trade and commerce

against restraints and monopolies, and more particularly under the provisions of law contained in Title 15 of the United States Code, including Sections 1, 2, and 7 of the Act of Congress known as the Sherman Act, and Sections 4, 5, 12 and 16 of the Act of Congress known as the Clayton Act (15 U.S.C.A. secs. 1, 2, 15, 16, 22, 26; 26 Stat. 209, 26 Stat. 210, 38 Stat. 731, 38 Stat. 736, 38 Stat. 737).

2.

The purpose of this action is to recover threefold the damages sustained by plaintiffs, plus reasonable attorney's fees and costs of suit, caused by defendants' illegal, monopolistic practices and restraints of trade and commerce, particularly as affecting plaintiffs, all as more fully set forth herein, for an injunction to restrain said illegal acts in the future, and for such other and further relief to which plaintiffs may be entitled.

II.

Plaintiffs

3.

The plaintiffs, Walter R. Waldron and Elmer Lysfjord, are residents of the City and County of Los Angeles, State of California, and since in or about January, 1952, have been engaged in the business of rendering an acoustical tile contracting service under the fictitious firm name and style of "aabeta co." and have maintained principal offices and conducted said business in the City and County

of Los Angeles, California, and in the City and County of San Bernardino, California.

III.

Defendants

4.

The defendants, L. D. Reeder Company of San Diego, R. E. Howard Company, the Harold E. Shugart Company, Inc., R. W. Downer Company, Coast Insulating Products, A. D. Hoppe, Paul H. Denton Co., and Acoustics, Inc., during all of the times named herein have been and now are engaged in the business of purchasing, distributing, installing, and contracting for the installation and sale of acoustical tile in the State of California, and each said defendant conducts said business in the City and County of Los Angeles, State of California, and regularly maintains an office and principal place of doing business in said City, County, and State.

5.

L. D. Reeder was, during all of the times mentioned herein, an officer, director and managing executive of the defendant, L. D. Reeder Company of San Diego, and during all of said times actively participated as such in the illegal acts complained of herein.

6.

R. E. Howard was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant, R. E. Howard Company,

and during all of said times actively participated as such in the illegal acts complained of herein.

7.

G. H. Morris was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant The Harold E. Shugart Company, Inc., and during all of said times actively participated as such in the illegal acts complained of herein.

8.

Roy Downer, Jr., was, during all of the times mentioned herein, and officer, director and managing executive of the defendant R. W. Downer Company, and during all of said times actively participated as such in the illegal acts complained of herein.

9.

Charles L. Newport was, during all of the times mentioned herein, an officer, director and managing executive of the defendant Coast Insulating Products, and during all of said times actively participated as such in the illegal acts complained of herein.

10.

Gustave Krause was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Coast Insulating Products, and during all of said times actively participated as such in the illegal acts complained of herein.

11.

Paul H. Denton was, during all of the times mentioned herein, an officer, director, and managing ex-

ecutive of the defendant Paul H. Denton Co., and during all of said times actively participated as such in the illegal acts complained of herein.

12.

Carroll Duncan was, during all of the times mentioned herein, an officer, director, and managing executive of the defendant Acoustics, Inc., and during all of said times actively participated as such in the illegal acts complained of herein.

13.

Plaintiffs are unaware of the true names or capacities of the defendants First Doe, Second Doe, Third Doe, and Fourth Doe, and therefore sue said defendants by such fictitious names and pray that their names and capacities, when ascertained, may be incorporated herein by appropriate amendments to this complaint.

14.

Acoustical Contractors Association of Southern California, Inc. (hereinafter referred to as The Association) is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of Los Angeles, State of California, and has as its members all of the defendants named in paragraph 4 hereinabove.

15.

In addition to the foregoing capacities and since December 10, 1951 (the date upon which the defendant "Acoustical Contractors Association of

Southern California, Inc." was incorporated), the defendants Paul H. Denton, Roy Downer, Jr., and Charles L. Newport have been directors and officers of said defendant Association and have actively participated as such in the illegal acts and purposes hereinafter complained of. The defendants L. D. Reeder Company of San Diego, R. E. Howard Company, The Harold E. Shugart Company, Inc., R. E. Downer Company, Coast Insulating Products, Paul H. Denton Co., and Acoustics, Inc., named and described as defendants hereinabove, are each corporations organized and existing under and pursuant to the laws of California.

16.

The Flintkote Company (hereinafter referred to as Flintkote) is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and is regularly authorized to do business and does in fact conduct its business in the City and County of Los Angeles and State of California, and through parent subsidiary or associated companies conducts business in various other states of the United States and in the Territory of Hawaii. Flintkote is either directly or through parent subsidiary or associated companies engaged in the manufacture of acoustical tile in the Territory of Hawaii and elsewhere outside the State of California, and is so engaged in the sale of said acoustical tile to acoustical tile contractors in the State of California (including the defendants hereinabove named) and

other acoustical tile contractors in California and in other states throughout the United States.

IV.

Definitions

17.

As used herein the following terms shall have the following meaning, to wit:

"Acoustical tile" is a substance made of cane or wood fibre material made into twelve-inch perforated squares of varying thicknesses or other sizes, which has been tested and has received a rating and listing by the Acoustical Materials Association, (hereinafter referred to as A. M. A.), as having definite and ascertained sound absorbing qualities.

"A. M. A." is an association with principal offices in the City and State of New York having as its members, among others, all of the manufacturers of acoustical tile which distribute said product in the State of California.

"Manufacturer" is a manufacturer of acoustical tile which sells or distributes such acoustical tile in the State of California.

"Acoustical tile contractor" is a person, firm, or corporation engaged in the business of buying acoustical tile for sale and installation in public and private building structures pursuant to public bids or negotiations with general contractors or others

engaged in erecting public or private building structures.

"Public building" is a building or other structure which is financed in whole or in part by money contributed by the Federal, State, or local governments.

"Private building" is a building or other structure which is erected and financed by private funds as distinguished from public funds.

V.

Interstate Commerce

18.

Acoustical tile is used as a sound absorbing material in building construction. For many years prior to the filing of the complaint herein architects, builders, and Federal and local government agencies have required, pursuant to established building specifications, that only acoustical tile tested, rated, and listed by A. M. A. as having certain sound dampening or absorbing qualities shall be acceptable for use in more than 90% of all public and private building in the Counties of Los Angeles and San Bernardino in the State of California and elsewhere throughout the United States. All manufacturers selling and distributing acoustical tile having an A. M. A. listing and rating in the Counties of Los Angeles and San Bernardino, California, and in the State of California have, during all of the times mentioned herein, sold such acoustical tile directly

to only a limited number of tile contractors in said areas at identical and substantially lower prices than such tile can be obtained or purchased from sources other than manufacturers and during all said times have limited the sale of such tile at such prices, in the Counties of Los Angeles and San Bernardino, State of California, to only the defendant tile contractors named herein, excepting only during the period of approximately January 1, 1952, to in or about March, 1952, during which time Flintkote sold such tile to plaintiffs as will be hereinafter described. In excess of 90% of all acoustical tile sold and distributed for use in private and public building structures in the State of California is manufactured by a limited number of manufacturers in states other than the State of California and in the Territory of Hawaii. Of the limited number of manufacturers of acceptable and competitive acoustical tile under the foregoing conditions the defendant Flintkote manufactures in the Territory of Hawaii the acoustical tile which it sells to acoustical tile contractors in the State of California and elsewhere throughout the United States. Such tile is delivered by boat from the Territory of Hawaii, consigned directly to the purchasing tile contractor. All or substantially all of the other acoustical tile sold in the State of California and in the Los Angeles and surrounding areas is manufactured by manufacturers in states other than the State of California, and is similarly consigned via rail shipments to acoustical tile contractors within the State of California.

Of the manufacturers of acoustical tile which is competitive by virtue of having been tested, rated and listed by A. M. A. and which for that reason will meet and comply with the specifications demanded for acoustical tile in public and private construction projects in the Counties of Los Angeles and San Bernardino, State of California, the defendant, Flintkote, has in the past supplied such tile on a competitive basis in said areas only to two or more members of the defendant, The Association, and for a limited period to the plaintiffs herein. All other manufacturers selling such acoustical tile likewise sell their product in the Counties of Los Angeles and San Bernardino, State of California, only to one or more members of the defendant, The Association, at prices and upon conditions of sale which will permit the purchaser to compete in the acoustical tile contracting business in said areas; that is to say, that each manufacturer doing business in said areas sells its product at the prices and upon the other terms and conditions of sale aforesaid to only a limited number of acoustical tile contractors, all of whom are members of the defendant, The Association, and each said manufacturer makes its product available to such tile contractors at identical prices and upon substantially identical terms and other conditions of sale.

In or about the latter part of 1951 the defendant Flintkote after lengthy investigation and negotiations entered into an agreement with plaintiffs

to supply plaintiffs with acoustical tile manufactured by Flintkote in the Territory of Hawaii on a continuing basis and at prices and upon other terms and conditions of sale identical with those upon which Flintkote was and is supplying such tile to other acoustical tile contractors in the State of California. In pursuance of and in reliance upon said agreement, plaintiffs terminated lucrative positions and employment in the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, State of California, and elsewhere in said State, and obtained and leased warehouses and office space in both said areas and locations for the purpose of conducting an acoustical tile contracting business in said areas utilizing the promised and agreed continuing source of acoustical tile manufactured by the defendant Flintkote. That in accordance with said agreement between Flintkote and the plaintiffs herein, orders were placed with the defendant Flintkote for acoustical tile and were delivered by Flintkote to plaintiffs at and consigned to plaintiff's warehouses in the City of Los Angeles and in the City of San Bernardino, State of California, at the prices and under the other terms and conditions of sale aforesaid. Immediately upon the execution of said agreement between the defendant Flintkote and the plaintiffs herein, plaintiffs, commencing in or about the latter part of 1951, advertised, sold, purchased, warehoused, and installed acoustical tile manufactured by Flintkote throughout said area, all with

the full knowledge, consent, and agreement of the defendant Flintkote.

VI.

Violations of Law

19.

Beginning at an exact date unknown to plaintiff's, but prior to the year 1951, and continuously thereafter up to and including the date of the filing of the complaint herein, the defendants, (well-knowing all of the facts hereinbefore alleged), have conspired to restrain and have restrained trade and commerce in the interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, State of California, and in the State of California and elsewhere throughout the United States, by contracting, combining, and conspiring with each other and with other manufacturers of acoustical tile in restraint of such trade and commerce, contrary to Section 1 of the Act of Congress commonly known as the Sherman Act (26 Stat. 209; 50 Stat. 693; 15 U.S.C.A., Sec. 1), and have thereby substantially lessened, limited, and destroyed competition in said trade and commerce and have prevented plaintiffs from receiving acoustical tile with which to compete in said trade and commerce.

Commencing at an exact date unknown to plaintiffs but prior to the year 1951 and continuously thereafter up to and including the date of the filing of the complaint herein, the defendants well knowing all of the facts hereinbefore alleged, have at-

tempted to monopolize and have monopolized the trade and commerce in interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, State of California, and in the State of California and elsewhere throughout the United States, contrary to Section 2 of the Act of Congress commonly known as the Sherman Act (26 Stat. 209; 50 Stat. 693; 15 U.S.C.A. Sec. 2).

Said combinations, agreements, conspiracies, monopolies, and attempts to monopolize have, during all of said period of time tended to restrain and monopolize and have in fact restrained and monopolized trade and commerce in acoustical tile in interstate and foreign commerce.

VII.

The Objects and Purposes of the Illegal Restraints and Monopolies

20.

Among the objects and purposes of the illegal restraints and monopolies alleged herein were and are the following:

a. To maintain and adhere to and perpetuate non-competitive prices and terms and conditions of purchase of acoustical tile from manufacturers by acoustical tile contractors in the Counties of Los Angeles and San Bernardino and throughout the State of California, and to protect and perpetuate the existing non-competitive price fixing and business allocation scheme and device and agreement

existing among acoustical tile contractors in said areas.

b. To eliminate all or substantially all competition in the sale and installation of acoustical tile in public and private construction works in the Counties of Los Angeles and San Bernardino and elsewhere in the State of California.

c. To preserve and perpetuate the existing agreement and plan adhered to by acoustical tile contractors whereby the sale and installation of acoustical tile mentioned and described in paragraphs a and b above would be allocated among members of the defendant, The Association, at non-competitive exorbitant and high fixed prices and upon other fixed and non-competitive conditions of sale rather than pursuant to open and competitive bids and negotiations among all acoustical tile contractors doing business in said areas.

d. To exclude competing acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile, in Los Angeles and surrounding areas, with the defendant acoustical tile contractors named herein.

e. To obtain a practical control and monopoly over the purchase, sale, and installation of acoustical tile in public and private buildings in the Counties of Los Angeles and San Bernardino in the State of California and elsewhere in said State.

f. To obtain maximum exorbitant and non-competitive profits in the sale and installation of

acoustical tile for use in public and private buildings in the Counties of Los Angeles and San Bernardino, State of California, and elsewhere in the State of California by the defendant acoustical tile contractors named herein.

g. To deprive the public generally of the benefits of a competitive market in the expenditure of public and private funds for schools, hospitals, offices, and other types of public and private building construction.

VIII.

Acts Done in Furtherance of the Illegal Restraints and Monopolies

21.

In furtherance of said illegal restraints and monopolies and to accomplish the aforesaid objects and purposes of the same, all of the defendants, and each of them, have during the times mentioned herein and since prior to the year 1951 done and caused to be done each of the following acts among others:

a. Conspired and agreed among themselves and with each other to restrain interstate and foreign trade and commerce in the sale and installation of acoustical tile in the counties of Los Angeles and San Bernardino in the State of California and elsewhere in said State and to maintain and perpetuate a monopoly of said trade and commerce in said areas in the defendant acoustical tile contractors named herein.

b. Conspired and agreed among themselves and with the defendant Flintkote to limit the sale and installation of acoustical tile in public and private buildings to the defendant acoustical tile contractors named herein in areas where said contractors are doing business to the exclusion of all competing contractors including plaintiffs.

c. Concertedly entered inordinately low bids for the sale and installation of acoustical tile in public and private buildings where it was ascertained by said defendants that a competing acoustical tile contractor was bidding or negotiating for said work or contract.

d. Allocated among the defendant acoustical tile contractors contracts for the installation of acoustical tile in schools, hospitals, and other public and private buildings pursuant to a collusive agreement among members of the defendant, The Association, whereby said members decided in advance of the filing of bids which member was to be the successful bidder and whereby the other members arbitrarily bid a higher figure to assure this intended result.

e. By the means described in subparagraph d above, the defendant tile contractors named herein arbitrarily, collusively, and substantially increased the cost of public and private building projects to their own exclusive benefit and profit.

f. Precluded any substantial competition (including the competition of plaintiffs) in the sale and

installation of acoustical tile in the Counties of Los Angeles and San Bernardino and elsewhere in the State of California by monopolizing all available competitive sources of acoustical tile sold in said areas.

g. The defendant acoustical tile contractors agreed among themselves to charge and maintain fixed prices for the sale and installation of acoustical tile.

h. By agreement among the defendant acoustical tile contractors, said defendants compelled the low bidder among the defendants on a particular job to withdraw such low bid in favor of a higher bid by another defendant acoustical tile contractor.

i. Agreed among themselves and with the defendant Flintkote to destroy the plaintiff's acoustical tile business for the sole purpose and with the sole intent of preventing plaintiffs from competing in the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, State of California, or in other areas in which the defendant acoustical tile contractors conducted such business for the purpose and with the result of thereby preserving the non-competitive price fixing and allocation scheme among the defendant acoustical tile contractors in said areas.

j. The defendants, and each of them, including the defendant Flintkote, agreed among themselves and with each other to terminate the supply of acoustical tile products to plaintiffs and pursuant

to said agreement with Flintkote did in fact terminate said source of supply of acoustical tile in violation of the agreement between the defendant Flintkote and plaintiffs for the sole purpose and effect of preventing plaintiffs from competing with said defendants, and to protect and perpetuate the existing monopoly in the sale and installation of acoustical tile theretofore existing among the members of the defendant, The Association, and have at all times since March, 1952, and in accordance with said conspiracy and agreement continued to prevent plaintiffs from obtaining an adequate competitive source of acoustical tile for sale and installation in the areas in which the defendant acoustical tile contractors conducted such business.

k. The defendant Flintkote entered into said agreement with the other defendants named herein with full knowledge of and for the express purpose and with the inevitable effect of foreclosing plaintiff's competition contrary to and in violation of defendant Flintkote's contract and agreement with plaintiffs as aforesaid. That in pursuance of Flintkote's agreement with the other defendants named herein, and for no other reason, Flintkote, in accordance with the demands and coercion exercised by the members of the defendant, The Association, has since March, 1952, and for the purposes aforesaid, refused to supply the plaintiffs with competitive tile with which to conduct their said business and have thereby and through agreement with said other named defendants destroyed plaintiffs' busi-

ness and have thus knowingly and intentionally aided and perpetuated the conspiracy of the defendant tile contractors named herein.

IX.

Effect of Defendants' Illegal Acts Upon Plaintiffs' Business

22.

The unlawful restraints, monopolies, attempts to monopolize, contracts, understandings, combinations and conspiracies of the defendants herein described have had and now have, as intended by the defendants, the following injurious effects upon plaintiffs' property and business:

(a) Members of the defendant, The Association, have by their said acts monopolized all sources of A. M. A. acoustical tile available for use in the tile contracting business in Los Angeles County and elsewhere in the State of California to the exclusion of plaintiffs herein as a result of which plaintiffs have sustained and will continue to sustain the following damages:

(aa) Having been so deprived of their only available source of supply of competitive acoustical tile with which to carry on their business, plaintiffs have been, are, and will continue to be unable to bid upon or compete with defendants in connection with any substantial amount of business whereby and because of which fact plaintiffs' business and their ability to carry on the same has been

drastically and substantially reduced, and will, ultimately be destroyed;

(bb) By reason of being deprived of the only source of supply of competitive acoustical tile, the good will created by plaintiffs over a period of years of association with building contractors (who award contracts to acoustical tile contractors) has been and is being destroyed at a progressively rapid rate;

(cc) Plaintiffs have, as a result of the illegal acts complained of herein, been compelled to vacate their business facilities in San Bernardino County, State of California, upon which they must and do, under the terms of a binding lease, continue to pay substantial rent;

(dd) The limited inventory of competitive A. M. A. acoustical tile heretofore sold to plaintiffs at competitive prices by the defendant Flintkote has been consumed. Plaintiffs are, therefore, without acoustical tile with which to carry on their said business on a competitive basis with the defendants named herein;

(ee) By reason of the conspiracy and agreement among the defendant acoustical tile contractors, to monopolize the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, California, and elsewhere in California and to foreclose and prevent competition therein and by reason of their demands that the defendant Flintkote participate therein and Flintkote's agreement to par-

ticipate in and adhere to said conspiracy and agreement, plaintiffs have been deprived of the only available source of competitive acoustical tile which would enable them to continue their business in competition with the defendants herein, and as a result thereof have been compelled to cease all active substantial competition in the acoustical tile contracting business with the consequent loss of good will, capital investment, and actual and potential profits, which, but for the acts of the defendants herein, would have resulted in large, substantial, and continuing profits to plaintiffs.

(ff) By reason of all of the foregoing facts plaintiffs have been damaged in the sum of not less than $100,000 to the date of the filing of this First Amended Complaint.

23.

Unless the defendants, and each of them, are restrained and enjoined from continuing their unlawful practices herein alleged, plaintiffs will continue to suffer loss of profits, destruction of good will, and diminution of capital investment, and will be and now are in imminent danger of having their entire acoustical tile contracting business destroyed.

Wherefore, plaintiffs pray:

(1) That the conspiracy, conspiracies, combination, combinations, contracts, and agreements hereinbefore described and the acts taken to effectuate their purposes be declared by this Court to be illegal and in violation of the Sherman Antitrust Act, Sections 1 and 2 (15 U.S.C.A. Secs. 1 and 2);

(2) For judgment against the defendants, and each of them, and in favor of the plaintiffs, for damages.

(3) For judgment against the defendants, and each of them, for costs of suit and reasonable attorney's fees pursuant to the laws of the United States as provided in such cases;

(4) That the defendants, and each of them, be restrained and enjoined, pending the final adjudication of this cause, and thereafter be permanently restrained and enjoined, from continuing each and all of the unlawful practices set forth herein;

(5) That the defendant Flintkote, its officers, and agents be enjoined from agreeing with the other defendants named herein or with any of them, or with any other acoustical tile contractor to refuse to sell acoustical tile to plaintiffs for installation and sale in the Counties of Los Angeles and San Bernardino, in the State of California;

(6) That the defendant Flintkote, its officers and agents and employees be enjoined from in any way way agreeing with the defendant members of the defendant Association to aid, assist or otherwise to perpetuate the purposes or objects of the conspiracies, combinations and monopolies, complained of herein;

(7) That pending an adjudication of the issues herein, the defendant Flintkote be required to reinstate and fulfill its agreement and contract with the plaintiffs, and that thereafter Flintkote be re-

quired to continue said contract and agreement so long as there exists no reason under sound business principles and practices for terminating the same.

(8) For such other and further relief as to the Court shall seem just and equitable.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

Plaintiffs hereby demand a jury trial of the issues involved in this action.

Duly verfied.

Lodged January 28, 1953.

[Endorsed]: Filed March 23, 1953.

[Title of District Court and Cause.]

ANSWER OF THE FLINTKOTE COMPANY TO FIRST AMENDED COMPLAINT

Defendant The Flintkote Company (hereinafter sometimes called "Flintkote") for answer to the first amended complaint on file herein, admits, denies and avers as follows:

1. Answering paragraph 1 of the first amended complaint, defendant Flintkote admits that plaintiffs have apparently attempted to allege a cause or causes of action under the acts and sections alleged; defendant Flintkote denies that any such cause or causes of action exist against it; except to the extent

admitted and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 1.

2. Answering paragraph 2 of the first amended complaint, defendant Flintkote admits that the relief prayed in the first amended complaint is substantially as described by the averments in said paragraph 2; defendant Flintkote denies that it was involved in any illegal or monopolistic practices or restraints of trade or commerce or any other acts or courses of conduct which might have injured plaintiffs or which might entitle plaintiffs to any injunction or damages or any other relief against defendant Flintkote; except as admitted and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 2.

3. Answering the allegations in paragraph 3 of the first amended complaint, defendant Flintkote admits that plaintiffs have been engaged in the acoustical contracting business under the name and style of "aabeta co." and in the early part of 1952 maintained a place of business in the City of San Bernardino, County of San Bernardino, California; except as admitted above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 3.

4. Answering paragraph 4 of the first amended complaint, defendant Flintkote admits that the defendants R. E. Howard Company, Coast Insulating Products, A. D. Hoppe, and Acoustics, Inc., were all engaged in the acoustical contracting business at the times mentioned; except as admitted above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 4.

5. Answering paragraphs 5 through 15 of the first amended complaint, and each of them, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraphs 5 through 15, inclusive, or any of them.

6. Answering paragraph 16 of the first amended complaint, defendant Flintkote admits and avers that: The Flintkote Company is a Massachusetts corporation; it is authorized to and does do business in the State of California; it maintains a place of business in the City of Vernon, County of Los Angeles, California; it conducts business throughout the United States; it manufactures acoustical tile in Hilo, Hawaii, Territory of Hawaii; it sells acoustical tile to some of the defendants herein, to wit, R. E. Howard Company, Coast Insulating Products, and Acoustics, Inc.; it sells acoustical tile to other acoustical contractors in San Diego, San Francisco, Sacramento, and Bakersfield, California and throughout the eleven Western States of the United States.

Except as admitted and averred above, defendant Flintkote denies each and all of the averments of said paragraph 16.

7. Answering paragraph 17, of the first amended complaint in which certain terms are given certain definitions, defendant Flintkote avers that many of the definitions are unnecessary, inappropriate, erroneous, ambiguous and/or unintelligible, and denies that the terms so defined are used throughout the complaint according to the definitions in said paragraph 17; defendant Flintkote admits and avers that the Pioneer Division of The Flintkote Company is a member of the Acoustical Materials Association and that the Acoustical Materials Association maintains offices in the City of New York, New York; except as admitted, averred and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 17.

8. Answering paragraph 18 of the first amended complaint, defendant Flintkote admits and avers that acoustical tile is used as a sound absorbing material in buildings; defendant Flintkote now sells its accoustical tile to three of the defendants herein, Acoustics, Inc., Coast Insulating Products, and R. E. Howard Company, and formerly sold its acoustical tile to three of the other defendants herein, A. D. Hoppe, Paul H. Denton Co., and L. D. Reeder (sued herein as L. E. Reeder), and

to plaintiffs herein; membership in the defendant Acoustical Contractors Association of Southern California, Inc., in no way affects defendant Flintkote's choice of accounts; defendant Flintkote sells its acoustical tile pursuant to prices and terms set forth in price lists which are applicable to all purchasers and which are published and revised from time to time; defendant Flintkote ships its acoustical tile from Hawaii, the place of manufacture, to continental United States by water carriers, and thereafter the acoustical tile is transported by truck or rail shipment to the warehouses or job-sites of the purchasers, occasionally stopping at Flintkote warehouses in continental United States; in general, acoustical tile is shipped from Hawaii only after orders therefor have been secured from purchasers in continental United States; in the latter part of 1951, defendant Flintkote accepted from plaintiffs an order for acoustical tile to be delivered in San Bernardino and to be used in the San Bernardino-Riverside area; in January, 1952, defendant Flintkote delivered the tile so ordered to plaintiffs at 901 N. Waterman Street, San Bernardino, California; after plaintiffs had been informed that no further orders from them would be accepted, certain small lots of acoustical tile were delivered to them at 7302 So. Atlantic Avenue, Bell, California. Except as admitted and averred above, defendant Flintkote denies that any contract or agreement ever existed between it and plaintiffs; denies that it contracted or agreed to supply plaintiffs with

acoustical tile on a continuing basis, or any basis, or at all; denies that it contracted or agreed to supply acoustical tile to plaintiffs in any specific quantity, or any quantity, or at all; denies that it contracted or agreed to supply acoustical tile to plaintiffs during any specific period of time, or any period of time, or at all. Except as admitted, averred, and denied above, defendant Flintkote denies each and all of the averments of said paragraph 18 to the extent that they refer to defendant Flinkote. Except as admitted, averred, and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 18.

9. Answering paragraphs 19 and 20 of the first amended complaint, and each of them, defendant Flintkote denies each and all of the averments of said paragraphs 19 and 20 and each of them to the extent that they refer to defendant Flintkote; except as denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraphs 19 and 20 and each of them.

10. Answering paragraph 21 of the first amended complaint, defendant Flintkote admits and avers that, except to the extent admitted and averred in paragraph 8 of this answer, it has refused and now refuses and will continue to refuse to supply

plaintiffs with accoustical tile; except as admitted and averred above, defendant Flintkote denies each and all of the averments of said paragraph 21 to the extent that they refer to defendant Flintkote; except as admitted, averred, and denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraph 21.

11. Answering paragraphs 22 and 23 of the first amended complaint, and each of them, defendant Flintkote denies each and all of the averments thereof to the extent that they refer to defendant Flintkote; except as denied above, defendant Flintkote states that it is without knowledge or information sufficient to form a belief as to the truth of each and every of the averments in said paragraphs 22 and 23 and each of them.

First Affirmative Defense

For a first affirmative defense, defendant Flintkote avers as follows:

1. Defendant Flintkote sold to plaintiffs one carload of acoustical tile, per the then current price list published by defendant Flintkote, and delivered the same to plaintiffs at San Bernardino, California, for use in the San Bernardino-Riverside area.

2. It was expressly understood by both plaintiffs and defendant Flintkote that a condition of such

sale was that plaintiffs would use the tile so sold and delivered in the San Bernardino-Riverside area only, and would not engage in the acoustical contracting business in the Los Angeles Metropolitan area.

3. Subsequent to the making of the sale and delivery averred in paragraph 1 of this first affirmative defense, it came to the attention of defendant Flintkote that, contrary to and in violation of the express condition of sale averred in paragraph 2 of this first affirmative defense, plaintiffs had established a place of business in Bell, California, and were engaged and engaging in the acoustical contracting business in the Los Angeles Metropolitan area.

4. Upon discovering the breach, violation and disregard by plaintiffs of the express condition of sale, as averred in paragraph 3 of this first affirmative defense, and because of said breach, violation and disregard, defendant Flintkote informed plaintiffs that it would not accept further orders for acoustical tile from plaintiffs.

5. Thereafter, solely out of courtesy to plaintiffs and not because of any obligation upon it to do so, defendant Flintkote advised plaintiffs that it would accept orders from plaintiffs for sufficient acoustical tile to enable plaintiffs to perform under contracts for the installation of Flintkote tile which had theretofore been awarded to plaintiffs; and defendant Flintkote thereafter in fact accepted or-

ders and delivered small lots of acoustical tile to plaintiffs at their place of business in Bell, California.

6. Any injury or damage which plaintiffs may have heretofore suffered, or be suffering, or suffer in the future by reason of their inability to obtain a suitable source of supply of acoustical tile with which to conduct their business is, has been, and will be proximately caused by the breach, violation, and disregard by plaintiffs of the express condition of the sale of tile to them by defendant Flintkote and has in no way resulted and does not and will not in any way result from any wrongful or unlawful acts or courses of conduct of defendant Flintkote.

Wherefore, defendant The Flintkote Company prays that plaintiffs take nothing by their claim or claims and that defendant Flintkote have judgment against plaintiffs for its costs in the defense of this action.

McCUTCHEN, BLACK, HARNAGEL & GREENE,
GEORGE HARNAGEL, JR.,
G. RICHARD DOTY,

By /s/ G. RICHARD DOTY.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 26, 1953.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant, The Flintkote Company, requests that the Court give to the jury the instructions annexed hereto numbered 1 through 53.

Dated: May 3rd, 1955.

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant,
The Flintkote Company.

Defendant's Instruction No. 1

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Exact copy of form 1 BAJI.

Defendant's Requested Instruction No. 1:
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 2

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

Exact copy of form 2 BAJI.

Defendant's Requested Instruction No. 2:
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 3

Statements of law often cannot be made abstractly, but must be related to possible situations of fact. Throughout my instructions you will bear in mind that whenever the possibility of a certain state of facts is assumed for the purpose of stating the applicable law, I do not mean to imply an opinion that the evidence has proved the existence of those facts, nor to suggest an opinion favorable or unfavorable to any party.

Exact copy of form 35, BAJI 1950 Supplement, except adaptations.

Defendant's Requested Instruction No. 3.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 4

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not

determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Exact copy of form 3 BAJI.

Defendant's Requested Instruction No. 4.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 5

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

Exact copy of form 4 BAJI except adaptations.

Defendant's Requested Instruction No. 5.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 6

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Exact copy of form 5 BAJI, except adaptations.

Defendant's Requested Instruction No. 6.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 7

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that

was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you.

Exact copy of form 23 BAJI.

Defendant's Requested Instruction No. 7.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 8

A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence; by the manner of the witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies; by the character of his testimony; by evidence showing his motives, an interest in the outcome of the case, or bias or prejudice against one of the parties: by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony.

Exact copy of form 26 BAJI, 1950 Supplement, with adaptations.

Defendant's Requested Instruction No. 8.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 9

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars.

Exact copy of form 27 BAJI.

Defendant's Requested Instruction No. 9.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 10

This is an action under Section 7 of the Sherman Act, as amended by Section 4 of the Clayton Act, incorporated in Title 15 of the United States Code Annotated Section 15.

It is a private, as distinguished from a governmental, action. And it is brought by Elmer Lysfjord and Walter R. Waldron doing business as aabeta co. against The Flintkote Company, a Corporation.

> Cape Cod Food Products vs., National Cranberry Ass'n. (D. C., Mass. 1954) 119 F. Supp. 900, 904.

Defendant's Requested Instruction No. 10.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 11

The provision in the law which permits a person to bring an action of this type is 15 U.S.C.A., Section 15. It states in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *"

15 U.S.C.A. Sec. 15.

Defendant's Requested Instruction No. 11.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 12

The plaintiffs claim that they have sustained injuries as a result of an alleged violation by The Flintkote Company and other persons of Section 1 or Section 2 of the Sherman Act. Section 1, insofar as is pertinent, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal * * *"

Section 2, insofar as it is pertinent, provides:

> "Every person who shall * * * combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

15 U.S.C.A., Sec. 1.

See paragraphs 1 and 2, pages 1 and 2 of First Amended Complaint.

Defendant's Requested Instruction No. 12.

Given: .....

Refused: .....

Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 13

In order for plaintiffs to recover in this action they must prove all of the elements of a cause of action entitling them to such recovery.

Defendant's Requested Instruction No. 13.

Given: .....

Refused: .....

Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 14 (New)

In this case plaintiffs have the affirmative of all issues and they must carry the burden of proving

all the issues. This "burden of proof" means that if no evidence were given on either side of an issue, your finding as to it would have to be against the plaintiffs. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the plaintiffs.

See form 21 BAJI.

Defendant's Requested Instruction No. 14 (New).
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 15

Although I cannot formally control you when you get into the jury room, I strongly recommend that you approach this case in the order in which my charge to you approaches it.

Cape Cod Food Products vs. National Cranberry Ass'n. (D. C. Mass., 1954) 119 F. Supp. 900.

Defendant's Requested Instruction No. 15.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 16

A primary question for you to consider is whether defendant The Flintkote Company was a party to an unlawful contract, combination or conspiracy in restraint of interstate commerce, or to monopolize a part of such commerce. If you find that no such unlawful contract, combination or conspiracy existed or that The Flintkote Company was not a party to any such contract, combination or conspiracy which may have existed, you must return a verdict for the defendant and you need not consider any other questions.

15 U.S.C.A. Sec. 1.

15 U.S.C.A. Sec. 15

Cape Cod Food products vs. National Cranberry Ass'n. (D. C. Mass., 1954) 119 F. Supp. 900, 909-910.

Defendant's Requested Instruction No. 16.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 17

A "conspiracy" may be defined quite broadly as a combination of two or more persons by concerted action to do an unlawful thing or to do a lawful thing in an unlawful manner.

Marino vs. United States (C.C.A. 9th, 1937) 91 Fed. 2d 691, 693;

Lynch vs. Magnavox Co. (C.C.A. 9th, 1938) 94 Fed. 2d 883, 888-889;

Alaska S.S. Co. vs. International Longshoremen's Association (D.C., W.D. Wash. 1916) 236 Fed. 964, 969.

Defendant's Requested Instruction No. 17.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 18

More specifically, a conspiracy consists of the following elements: First, an object to be accomplished; second, a plan or scheme embodying means to accomplish that object; third, an agreement or an understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effective means.

United States vs. Grossman (D.C., E.D. N.Y., 1931) 55 Fed. 2d 408, 410;

15 C.J.S., Conspiracy, sec. 35, p. 1058.

Defendant's Requested Instruction No. 18.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 19

The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful contract, combination or conspiracy.

Johnson vs. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 F. 2d 53, 62;

Interborough News Co. vs. Curtis Publishing Co. (D.C., S.D.N.Y. 1954) 127 F. Supp. 286, 301.

Defendant's Requested Instruction No. 19.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 20

You may not use any admission made outside of court by members of the alleged conspiracy for purposes of determining whether The Flintkote Company was a member of an unlawful conspiracy unless The Flintkote Company, through its agents, was present when the statement was made, and the agent or agents so conducted himself or themselves as to signify agreement with the statements or declarations. If you conclude, however, from the evidence that The Flintkote Company was a member of an unlawful conspiracy, you may then consider as if made by said company any statements or declarations of other members of such conspiracy, provided such statements were made during the existence of the conspiracy and in furtherance of an object or purpose of the particular conspiracy.

United States vs. Schneiderman (D.C., S.D. Cal. 1952) 106 F. Supp. 892, 903;

United States vs. United States Gypsum Company 333 U.S. 364, 388-389, 68 S. Ct. 525, 538-539 (1948);

United States vs. Imperial Chemical Industries (D.C., S.D.N.Y. 1951) 100 F. Supp. 504, 512.

Defendant's Requested Instruction No. 20.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 21

The defendant, The Flintkote Company, is a corporation, and as such acts only through its agents. A conspiracy, however, cannot exist between a corporation and its employees or agents acting in such capacity. You are instructed that there is nothing in the evidence which shows that any employee or agent of The Flintkote Company, insofar as this case is concerned, acted in any capacity other than as employee or agent. Accordingly, you may not base a finding of conspiracy merely upon any concert of action among the agents and employees of The Flintkote Company.

Nelson Radio & Supply Co. vs. Motorola, Inc. (C.A. 5th 1952) 200 F. 2d 911, cert. den. 345 U.S. 925, 73 S. Ct. 783 (1953);

Marion County Co-Op. Ass'n. vs. Carnation Co. (D.C., W.D. Ark. 1953) 114 F. Supp. 58.

Defendant's Requested Instruction No. 21.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 22

The Flintkote Company, or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy, may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever.

United States vs. Colgate & Co. 250 U.S. 300, 39 S. Ct. 465 (1919);

Times-Picayune Pub. Co. vs. United States 345 U.S. 594, 73 S. Ct. 872, 889 (1953);

Johnson vs. J. H. Yost Lumber Co. 117 F. 2d 53, 61 (8th Cir. 1941);

Chicago Seating Co. vs. S. Karpen & Bros. 177 F. 2d 863 (7th Cir. 1949);

Nelson Radio & Supply Co. vs. Motorola, Inc. 200 F. 2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925, 73 S. Ct. 783 (1953);

Blue Bell Co. vs. Frontier Refining Co. 213 F. 2d 354 (10th Cir. 1954).

Defendant's Requested Instruction No. 22.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 23

You are instructed that you cannot find that The Flintkote Company was engaged in an unlawful contract, combination or conspiracy solely on the basis of the fact that The Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs. You can so find only if there is other evidence of a substantial nature which furnishes a valid basis from which the alleged fact of such unlawful conduct may reasonably be inferred.

Johnson vs. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 Fed. 2d 53.

Defendant's Requested Instruction No. 23.

Given: .....

Refused: .....

Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 24

If you find that plaintiffs, contrary to a condition imposed by The Flintkote Company, invaded a trade territory of established dealers handling Flintkote products, you are instructed that that would be an ample reason of a substantial business character for The Flintkote Company to have refused to make further sales of acoustical tile to plaintiffs. If you find that The Flintkote Company refused to sell acoustical tile to plaintiffs for that reason and not as a consequence of a knowing participation in an unlawful conspiracy, then The Flintkote Company cannot be liable in any respect to plaintiffs for such refusal to sell.

Johnson v. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 F.2d 53, 62

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F. Supp. 286, 301

Defendant's Requested Instruction No. 24.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 25

Even if you find that The Flintkote Company declined to sell or discontinued selling acoustical tile to plaintiffs as the result of pressure brought upon The Flintkote Company by other persons, The Flintkote Company would not thereby participate in any unlawful conspiracy if it did not know that such conspiracy existed; and you cannot infer knowledge of such conspiracy solely from the fact, if it be the fact, that The Flintkote Company yielded to such pressure.

Johnson v. J. H. Yost Lumber Co. (C.C.A. 8th 1941) 117 F.2d 53, 62;

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286, 301.

Defendant's Requested Instruction No. 25.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 26

Before you can conclude that a combination agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is substantially to lessen, hinder, or suppress competition in the channels of trade or commerce or to monopolize trade or commerce.

Fashion Originators' Guild v. Federal Trade Com'n 312 U.S. 457, 466, 61 S.Ct. 703, 707 (1941);

Shotkin v. General Electric Co. (C.A. 10th, 1948) 171 F.2d 236, 238.

Defendant's Requested Instruction No. 26.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 27

Merely because a contract, combination, agreement or concert results in a restraint of trade or commerce, it does not follow automatically that it is of an unlawful nature. Only unreasonable restraints of trade or commerce are condemned by the law.

Standard Oil Co. v. United States 221 U.S. 1, 31 S.Ct. 502, 517 (1911);

Board of Trade of City of Chicago v. United States 246 U.S. 231, 38 S.Ct. 242 (1918).

Defendant's Requested Instruction No. 27.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 28

Whether or not a particular restraint is reasonable or unreasonable is a question of relation and degree.

Sugar Institute v. United States 297 U.S. 553, 600, 56 S.Ct. 629, 643 (1936).

Defendant's Requested Instruction No. 28.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 29

The true test of the legality of a restraint of trade is whether the restraint imposed is such as merely

regulates and perhaps thereby promotes competition or whether it is such as suppresses or destroys competition. In arriving at your determination of this question you must consider the facts peculiar to the business to which the restraint is applied, the nature of the restraint, and its actual effect.

Board of Trade of City of Chicago v. United States 246 U.S. 231, 38 S.Ct. 242, 244 (1918).

Defendant's Requested Instruction No. 29.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 30

Before plaintiffs are entitled to recover damages for violations of the antitrust laws they must prove some appreciable harm to the general public in the form of undue or unreasonable restriction of trade and commerce as a result of a wrongful contract, combination, conspiracy, monopoly, or attempt to monopolize.

Shotkin v. General Electric Co. (C.A. 10th 1948) 171 F.2d 236.

Defendant's Requested Instruction No. 30.
Given: .....

Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 31

The element of public injury may not be satisfied by anything less than proof of a substantial effect on the interstate commerce concerned.

Shotkin vs. General Electric Co. (C.A. 10th 1948) 171 Fed.2d 236, 239, 240;

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286, 301.

Defendant's Requested Instruction No. 31.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 32

The general public interests have not been injured within the meaning of the law unless the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in

the quality of the merchandise available in the channels of commerce, or a similar consequence in the free flow of interstate commerce.

Shotkin v. General Electric Co. (C.A. 10th 1948) 171 F.2d 236, 238, 239;

Fedderson Motors, Inc. v. Ward (C.A. 10th 1950) 180 F.2d 519;

Interborough News Company v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286, 301.

Defendant's Requested Instruction No. 32.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 33

There is nothing inherently unlawful in a manufacturer's establishing the policy of limiting the number of distributors in a given area. If you find that such a policy was established by The Flintkote Company for the purpose of promoting good relations with its own customers and furthering its own legitimate business interests and was not done for the purpose of bringing about an unlawful restraint of trade or the creation of a monopoly, there would be no violation of the antitrust laws in the estab-

lishment or maintenance of such a policy by The Flintkote Company.

Bascom Launder Corp. v. Telecoin Corp. (C.A.2d 1953) 204 F.2d 331, 335, Cert. den. 73 S.Ct. 1133;

Brosins v. Pepsi-Cola Co. (C.C.A.3d 1945) 155 F.2d 99, 102, 104;

Boro Hall Corporation v. General Motors Corporation (C.C.A.2d 1942) 124 F.2d 822, 823, and see opinion on denial of rehearing, 130 F.2d 196, 197;

United States v. Bausch & Lomb Optical (D.C., S.D.N.Y., 1942) 45 F.Supp. 387, 398-399, modified in non-pertinent respects, and, as modified, affirmed, 321 U.S. 707, 64 S.Ct. 805;

United States v. Addyston Pipe & Steel Co. (C.C.A.6th 1898) 85 F. 271, 287, affirmed, 175 U.S.211, 20 S.Ct. 96.

Defendant's Requested Instruction No. 33.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 34

If you find that certain persons connected with this case acted in a similar manner with knowledge

that other persons were so acting, you are permitted to consider such conscious parallel action as some evidence that such persons contracted, combined or conspired so to act.

But conscious parallel business behavior is not in itself a violation of the antitrust laws and does not necessarily show an agreement among the persons so acting.

Similarity of action may be the result not of previous agreement but of solving a similar situation in a similar manner.

The crucial question for determination in connection with conscious parallel behavior is whether it stemmed from independent decision or from agreement, tacit or expressed.

Theatre Enterprises v. Paramount Film D. Corp., 346 U.S. 537, 540-541, 74 S.Ct. 257, 259 (1954);

Fanchon & Marco v. Paramount Pictures (D.C., S.D.CAL, 1951) 100 F.Supp. 84, 90 and (C.A. 9th 1954) 215 F.2d 167, 170.

Defendant's Requested Instruction No. 34.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 35

A finding of monopoly in this case would necessarily involve a finding by you that certain persons had the power to control the acoustical tile business in Los Angeles and so exercised that power as to exclude others from the business. The essence of monopoly is the power to exclude competition generally in a field for the benefit of a particular person or class.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946);

Interborough News Co. v. Curtis Publishing Co. (D.C., S.D.N.Y., 1954) 127 F.Supp. 286.

Defendant's Requested Instruction No. 35.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 36

A finding of attempt to monopolize in this case would necessarily involve a finding that certain persons employed methods, means and practices which would, if successful, accomplish monopolization and which, though falling short of monopoly, come so close as to create a dangerous probability thereof.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946).

Defendant's Requested Instruction No. 36.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 37

The Flintkote Company has the exclusive right to control the distribution of its branded products, including acoustical tile. It does not, however, by itself have a monopoly of the acoustical tile business.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946);

Arthur v. Kraft-Phoenix Cheese Corp. (D.C., M.D., 1938) 26 F.Supp. 824-828.

Defendant's Requested Instruction No. 37.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 38

You are instructed that as a matter of law neither The Flintkote Company nor any other person or corporation directly or indirectly connected with this case individually had a monopoly of the acoustical tile business in Los Angeles.

U. S. v. Aluminum Company of America (C.C.A.2d, 1945) 148 F.2d 416.

Defendant's Requested Instruction No. 38.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 39

You are further instructed as a matter of law that neither The Flintkote Company nor any other person or corporation directly or indirectly connected with this case attempted to monopolize for itself alone the acoustical tile business in Los Angeles.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946);

U. S. v. Aluminum Company of America (C.C.A.2d 1945) 148 F.2d 416.

Defendant's Requested Instruction No. 39.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 40

It follows, then, that any finding of monopoly or attempt to monopolize in this case must be based upon a combination or conspiracy, to which The Flintkote Company was a party, the purpose of which was to monopolize the acoustical tile business in Los Angeles.

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125 (1946).

Defendant's Requested Instruction No. 40.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 41

I shall now instruct you on the subject of the measure of damages in this action because it is my

duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they are being given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Exact copy of form 180 BAJI, except underlined modifications.

Defendant's Requested Instruction No. 41.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 42

Even if plaintiffs convince you that The Flintkote Company has engaged in conduct prohibited by the antitrust laws and which has resulted in injury to the public, that, by itself, does not give plaintiffs the right to recover damages. Plaintiffs must go still farther, and the burden of proof is upon them to show some real and actual pecuniary loss or damage by reason of such unlawful conduct. There is no duty imposed by the law upon a defendant to show that its acts have not worked injury to a plaintiff. On the contrary, the duty and burden of proving injury to their business or prop-

erty is imposed by law upon the plaintiffs, and, unless they prove this fact of injury to their business or property as a result of such conduct by a preponderance of the evidence, they cannot recover damages.

Foster & Kleiser Co. v. Special Site Sign Co. (C.C.A. 9th 1936) 85 F.2d 742, 750;

Lowry v. Tile, Mantel & Grate Ass'n (C.C., N.D.Cal., 1900) 106 Fed. 38, 46, affirmed 115 Fed. 27;

Twin Ports Oil Co. v. Pure Oil Co. (C.C.A. 8th 1941) 119 F.2d 747, 751.

Defendant's Requested Instruction No. 42.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 43

A plaintiff in an antitrust action can recover damages only for injury to his business or property, which does not include damages for embarrassment, humiliation, disappointment, or other matters of a personal nature.

15 U.S.C.A. Sec. 15;

Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 165, 43 S.Ct. 47, 50 (1922);

Twin Ports Oil Co. v. Pure Oil Co. (C.C.A. 8th 1941) 119 F.2d 747, 751;

Leonard v. Socony-Vacuum Oil Co. (D.C., W.D.Wis. 1942) 42 F.Supp. 369;

see: Clark Oil Co. v. Phillips Petroleum Co. (C.C.A. 8th 1945) 148 F.2d 580, 582.

Defendant's Requested Instruction No. 43.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 44

In order for plaintiffs to recover damages they must show by a preponderance of the evidence that there is a direct causal relationship between the restraint and the specific claimed injuries. That is to say, the injuries must result from something forbidden or made unlawful by the antitrust laws and be the proximate result thereof.

Sullivan v. Associated B. & D. of United States (D.C., S.D.N.Y., 1919) 272 Fed. 323, 328;

Conference of Studio Unions v. Loew's, Inc. (C.A. 9th 1951) 193 Fed.2d 51.

Defendant's Requested Instruction No. 44.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 45 (New)

The damages, if any, which you may award plaintiffs are not to be based on speculation or guesswork. Damages which you may award plaintiffs, are to be just and reasonable and must be based only on such relevant factual data, if any, as was placed in evidence in this case.

Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 264, 66 Sup. Ct. 574, 579-580 (1946).

Defendant's Requested Instruction No. 45 (New).
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 46

The amount of damages alleged in the complaint is $100,000, but this allegation is merely a claim, is not evidence, and must not be considered by you as evidence in the event you should undertake to determine the amount of plaintiffs' damage.

Exact copy of form 173-A, BAJI, except adaptations.

Defendant's Requested Instruction No. 46.
Given: .....
Refused: .....
Given as Modified: .....

Withdrawn.

....., Judge of the United States District Court.

Defendant's Instruction No. 46(a) (New)

In the event you should determine that under the law as stated to you plaintiffs are entitled to damages in some amount, you will guide yourself in the computation of that sum by the following rules:

(a) Plaintiffs could not have sustained recoverable damages by reason of acts for which The Flintkote Company may be responsible prior to February 19, 1952, that being the date that The Flintkote Company advised plaintiffs that they would no longer sell acoustical tile to them except to cover plaintiffs' outstanding commitments.

Complaint, Par. II, 3;

International Tag & S. Co. v. American Salesbook Co. (D.C., S.D.N.Y., 1943) 6 FRD 45, 47.

Defendant's Requested Instruction No. 46(a) (New)
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 46(b)(c)

(b) Plaintiffs would be entitled to recover for injuries sustained prior to July 21, 1952, that being the date this action was instituted.

(c) Plaintiffs would be entitled to recover for injuries sustained subsequent to July 21, 1952, only in the event that the preponderance of the evidence convinces you that such injuries occurred as a consequence of acts done before July 21, 1952. In other words, you are not to concern yourselves with acts, including refusals by The Flintkote Company to sell plaintiffs acoustical tile, which occurred after July 21, 1952; plaintiffs are not entitled to recover damages in this action for injuries, if any there were, resulting from such acts.

Lawlor v. Loewe, 235 U.S. 522, 35 Sup. Ct. 170, 172, (1915);

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A. 2d, 1939) 101 Fed. 2d 79;

Frey & Son v. Cudahy Packing Co. (D.C., Md., 1917) 243 Fed. 205;

Savannah Theatre Co. v. Lucas & Jenkins (D.C., S.D.Ga., 1944) 8 F.R.Serv. 34.12, Case 2.

Defendant's Requested Instruction No. 46(b)(c).
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 46(d) (New)

(d) Therefore, plaintiffs would be entitled to recover only for damages sustained, if any, as a consequence of acts for which The Flintkote Company is responsible and occurring between February 19, 1952, and July 21, 1952.

Complaint, Par. VIII, k;

Lawlor v. Loewe, 235 U.S. 522, Sup.Ct. 170, 172 (1915);

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A.2d, 1939) 101 Fed.2d 79;

Frey & Son v. Cudahy Packing Co. (D.C. Md. 1917) 243 Fed. 205;

Savannah Theatre Co. v. Lucas & Jenkins (D.C., S.D.Ga., 1944) 8 F.R.Serv. 34.12, Case 2.

Defendant's Requested Instruction No. 46(d) (New)
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 46(e)

(e) Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to July 21, 1952.

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A.2d 1939) 101 Fed.2d 79;

Frey & Son v. Cudahy Packing Co. (D.C., Md. 1917) 243 Fed. 205.

Defendant's Requested Instruction No. 46(e).
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 46(f)

(f) Plaintiffs cannot recover in this action any damages which may have resulted from their inability to obtain acoustical tile from the defendant Flintkote on a direct basis during any period commencing on or after July 21, 1952.

Connecticut Importing Co. v. Frankfort Distilleries (C.C.A.2d, 1939) 101 Fed.2d 79;

Frey & Son v. Cudahy Packing Co. (D.C., Md. 1917) 243 Fed. 205.

Defendant's Requested Instruction No. 46(f).
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 47

You are instructed that if you should determine plaintiffs are entitled to damages, you are not to concern yourselves with the trebling of that sum. The trebling of the damages is no part of your function as a jury. That is a question for the Court.

Cape Cod Food Products v. National Cranberry Association (D.C., Mass., 1954) 119 Fed.Supp. 900, 910-911;

Lowry v. Tile, Mantel & Grate Ass'n of California (C.C., Cal., 1900) 106 Fed. 38, affirmed 115 Fed. 27.

Defendant's Requested Instruction No. 47.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 48

Evidence has been admitted in this case showing that $20,000 was paid to plaintiffs by certain persons in exchange for an enforceable promise by plaintiffs not to sue those persons on account of the injuries claimed to have been sustained in this case. In paying the $20,000 those persons did not thereby admit legal liability. Neither the payment of the $20,000 nor the execution of the document entitled "Covenant Not to Sue" was in furtherance of any unlawful conspiracy.

The law favors compromises and settlements, and the settlement and payment of any claim made against the defendant and other persons by any person involved in the controversy in question must not be and cannot be construed to be an admission of liability, in favor of the plaintiffs in this case.

You will not, therefore, infer from the fact of payment that any contract, combination or conspiracy in restraint of trade or to monopolize trade existed or that plaintiffs sustained injuries as a consequence of acts in furtherance thereof.

See form 37 BAJI;

See: Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 729, 232 Pac.2d 572 (1951);

Fiswick v. United States, 329 U.S. 211, 217, 67 S.Ct. 224, 227 (1946);

Logan v. United States, 144 U.S. 263, 309, 12 S.Ct. 617, 632 (1892);

Las Vegas Merchant Plumbers Ass'n v. United States (C.A. 9th 1954) 210 F.2d 732, 741;

United States v. Food & Grocery Bureau of Southern California (D.C., S.D.Cal., 1942) 43 F.Supp. 966, 969.

Defendant's Requested Instruction No 48.
Given: .....
Refused: .....
Given as Modified: .....

....., Judge of the United States District Court.

Defendant's Instruction No. 49

In the event you should determine under the principles of law stated to you that plaintiffs are entitled to damages in a certain amount by reason of acts for which The Flintkote Company is responsible, you will have to consider the question of whether plaintiffs have already been paid such damages either in part or in full.

Evidence has been presented to you which conclusively shows that plaintiffs already have received the sum of $20,000 from certain persons, either in full or partial compensation for injuries claimed to have been suffered in this case.

Therefore, in the event you determine that plaintiffs' total injuries sustained may be justly compensated by the sum of $20,000 or any lesser sum, you will award plaintiffs no damages whatsoever. If, however, you determine that plaintiffs' proved recoverable damages exceed the sum of $20,000, then you may award an amount equal to the total damages sustained less $20,000. In other words, you are instructed that any amount you might determine would justly compensate plaintiffs for their injuries is to be reduced by deducting the $20,000 already received and awarding plaintiffs the remainder.

15 U.S.C.A. Sec. 15;

Huskey Refining Co. v. Barnes (C.C.A. 9th 1941) 119 Fed.2d 715, 716;

Rector v. Warner Bros. Pictures (D.C., S.D. Cal. 1952) 102 F.Supp. 263, 264;

Harmon v. Gibens, 88 Ga.App. 629, 77 S.E.2d 223, 228 (1943);

McWhirter v. Otis Elevator Co. (D.C., W.D. S.C. 1941) 40 F.Supp. 11, 13;

Bedwell v. De Bolt (Ind.) 50 N.E.2d 875, 879 (1943);

Restatement of Torts, Section 885(3).

Defendant's Requested Instruction No. 49.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 50

The law forbids you to determine any issue in this case by resort to chance. You will understand this principle of law better, perhaps, if I give you an illustration: Suppose that after jurors have decided that a plaintiff is entitled to recover, they agree that each juror shall write down or state an amount of damages that he believes should be awarded, that all such amount shall be totaled, the total divided by twelve to find an average, and that the average so found shall be the amount of the verdict. To use such a method would be to deter-

mine the issue of damages by chance and would be unlawful.

Exact copy of form 181 Alternate, BAJI, 1950 Supplement.

Defendant's Requested Instruction No. 50.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 51

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Exact copy of form 7 BAJI.

Defendant's Requested Instruction No. 51.
Given: .....
Refused: .....
Given as Modified: .....

.....,
Judge of the United States
District Court.

Defendant's Instruction No. 52

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

Exact copy of form 8 BAJI.

Defendant's Requested Instruction No. 52.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

Defendant's Instruction No. 53

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. As soon as all twelve of you shall have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room.

See Form 9 BAJI;

Maxwell v. Dow, 176 U.S. 586, 20 S.Ct. 448 (1900).

Defendant's Requested Instruction No. 53.
Given: .....
Refused: .....
Given as Modified: .....

....,
Judge of the United States
District Court.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES ON EFFECT OF "COVENANT NOT TO SUE"

Defendant The Flintkote Company hereby submits a memorandum of points and authorities on the effect of the document entitled "Covenant Not to Sue," executed by plaintiffs and former defendants in the above-captioned action.

Respectfully submitted,

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant,
The Flintkote Company.

* * *

Covenant Not to Sue

This Agreement made and entered into between Elmer Lysfjord and Walter R. Waldron, co-partners doing business under the firm name and style of "aabeta co.", and the co-partnership of aabeta co., parties of the first part, hereinafter referred to as "covenantors," and L. D. Reeder Company of San Diego, R. E. Howard Company, The Harold E. Shugart Company, Inc., R. W. Downer Com-

pany, Coast Insulating Products, A. D. Hoppe, individually and doing business under the fictitious name and style of the Sound Control Company, The Paul H. Denton Co., Acoustics, Inc., L. E. Reeder, R. E. Howard, G. H. Morris, Roy Downer, Jr., Carroll Duncan, Charles L. Newport, Gustave Krause, Paul H. Denton, Acoustical Contractors Association of Southern California, Inc. (formerly known as Acoustical Contractors Association of Southern California, Inc.), parties of the second part, hereinafter referred to as "covenantees,"

Witnesseth

Whereas, on or about July 21, 1952, Elmer Lysfjord and Walter R. Waldron, doing business as aabeta co. filed a civil action in the United States District Court for the Southern District of California, Central Division, (No. 14350-T), against the covenantees herein and others, alleging purported violations of the antitrust statutes and laws of the United States by the defendants therein named in connection with the operation of covenantors' business in Los Angeles and San Bernardino, California, claiming damages in the sum of Two Hundred Twenty-five Thousand Dollars ($225,000.00); and

Whereas, the said plaintiffs in said action, covenantors herein, filed their first amended complaint on or about Feb. 24, 1953, against the covenantees herein and others alleging purported violations of said antitrust statutes and laws by the defendants therein named, claiming damages in said first

amended complaint of Three Hundred Thousand Dollars ($300,000.00); and

Whereas, all of the covenantees have filed answers denying the allegations of the original complaint and the first amended complaint; and

Whereas, the covenantors are desirous, both jointly and severally, and as a co-partnership or other entity or association under the name of aabeta co., of discontinuing their action against the covenantees herein, and each of them, and the covenantees herein are desirous of having said action discontinued against each of them; and it is the joint and several desire of the covenantors and covenantees that the covenantees herein be assured that covenantors' action filed by them will be discontinued against the covenantees and each of them, and that no other action will be instituted by the covenantors against the covenantees, either jointly or severally, under any of the antitrust statutes or laws of the United States or of the State of California, or under the statutes or laws of any sovereignty whatsoever, on any of the matters set forth in the original or first amended complaint or on matters accruing to and including the day of execution of this covenant; and

Whereas, the covenantors do hereby represent that no other person or persons are partners in aabeta co., and that no other person or persons has or have any interest in the ownership, management, operation or control thereof, and that no other per-

son or persons has or have any interest in the action No. 14350-T other than the covenantors;

Now, Therefore, for and in consideration of the sum of Twenty Thousand Dollars ($20,000.00), receipt of which is hereby acknowledged by them, the undersigned covenantors do hereby covenant and agree with the undersigned covenantees and each of them as follows:

I.

That the undersigned covenantors have the sole and exclusive right to enter into this covenant not to sue for themselves, jointly and severally, and in behalf of aabeta co., a co-partnership or other association or entity, and that no other person or persons has or have any interest in the ownership, management, operation or control of aabeta co., and that no other person or persons has or have any interest in the action being discontinued against the covenantees herein.

II.

That the undersigned covenantors will not jointly or severally sue the covenantees L. D. Reeder Company of San Diego, R. E. Howard Company, The Harold E. Shugart Company, Inc., R. W. Downer Company, Coast Insulating Products, A. D. Hoppe, individually and doing business under the fictitious name and style of the Sound Control Company, The Paul H. Denton Co., Acoustics, Inc., L. E. Reeder, R. E. Howard, G. H. Morris, Roy Downer, Jr., Carroll Duncan, Charles L. Newport, Gustave Krause, Paul H. Denton, Acoustical Contractors

Association of Southern California, Inc. (formerly known as Acoustical Contractors Association of Southern California, Inc.), or any of them, or any of their officers, directors, shareholders, partners, successors, assigns, agents, servants or employees, on account of any claim, demand, action, or cause of action, of any kind or nature, arising out of, or in any manner connected with, or relating to the matters alleged in the original, or first amended complaints; or arising out of, or in any manner connected with, or relating to the ownership, management, operation or control of the business of the covenantors, either jointly or severally, or under the name of aabeta co., or any other name, either as a co-partnership, association or any other entity, which may be directly or indirectly connected with, or related to any of the antitrust statutes or laws of the United States or of the State of California or of any other statute or law of any sovereignty whatever, to and including the date of execution of this covenant not to sue.

III.

That the undersigned covenantors shall upon execution of this covenant not to sue, dismiss without prejudice, their action No. 14350-T heretofore filed by them, against all of the covenantees herein, without costs, and shall not reinstitute or attempt to continue said action.

IV.

That the sum of Twenty Thousand Dollars ($20,000.00) paid herein to the covenantors as considera-

tion for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only partial compensation therefore, and it is understood and agreed that the covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than those expressly named and designated herein, and that specifically covenantors retain their claims and causes of action against all other parties who are defendants in original and first amended complaints, including The Flintkote Company.

V.

That should the covenantors or either or any of them breach any of the covenants or agreements herein set forth, then they promise and agree, jointly and severally, to indemnify and hold harmless the covenantees, singly and collectively, and any shareholder, partner, successor, assign, servant, agent and employee of any covenantee, from any damage resulting from any such breach by the covenantors, or either or any of them, including but not limited to, the costs and expenses of defending any action or proceeding instituted by covenantors, or either or any of them, costs and expenses of defending the continuation of civil action No. 14350-T by covenantors, or any or either of them, the costs and expenses of any action instituted by any of the cov-

enantees for breach of this covenant not to sue by the covenantors, or either or any of them. Such costs and expenses shall include, but not be limited to, preparation of the defense of any action instituted by covenantors or either or any of them against covenantees, or any of them, preparation of the defense of the present action should it be continued by the covenantors, the prosecution of any action instituted by covenantees for breach of this covenant by covenantors, and shall include reasonable attorneys' fees and all other costs and expenses, whether taxable or not.

VI.

That nothing herein set forth is intended to mean nor to be construed as any admission of liability on the part of any of the covenantees with respect to any of the matters alleged in the complaint and the first amended complaint.

VII.

That each and all of the terms, covenants and conditions of this covenant not to sue shall inure to the benefit of, and shall be binding upon their respective heirs, successors (whether by merger or otherwise), assigns, executors, administrators and transferees of each of the parties hereto, their officers, directors, shareholders, partners, agents, servants and employees.

VIII.

This agreement is executed in quadruplicate, of which each is an original.

In Witness Whereof the covenantors and the covenantees have affixed their names the day and year first above written, the name of each corporate covenantee being affixed by its officers thereunto duly authorized.

/s/ ELMER LYSFJORD,

/s/ WALTER R. WALDRON,

aabeta co.,

By /s/ ELMER LYSFJORD,

Covenantors.

L. D. REEDER COMPANY OF SAN DIEGO,

By /s/ L. D. REEDER;

R. E. HOWARD COMPANY,

By /s/ R. E. HOWARD;

THE HAROLD E. SHUGART COMPANY, INC.,

By /s/ G. H. MORRIS;

R. W. DOWNER COMPANY,

By /s/ ROBERT ARNETT;

COAST INSULATING PRODUCTS,

By /s/ G. J. KRAUSE;

A. D. HOPPE, Individually and Doing Business Under the Fictitious Name and Style of THE SOUND CONTROL COMPANY,

By /s/ A. D. HOPPE;

THE PAUL H. DENTON CO.,

By /s/ PAUL H. DENTON;

ACOUSTICS, INC.,

By /s/ J. CARROLL DUNCAN;

/s/ L. D. REEDER,

/s/ R. E. HOWARD,

/s/ G. H. MORRIS,

/s/ ROY DOWNER, JR.,

/s/ J. CARROLL DUNCAN,

/s/ C. L. NEWPORT,

/s/ G. J. KRAUSE,

/s/ PAUL H. DENTON.

ACOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC. (Formerly Known as ACCOUSTICAL CONTRACTORS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.),

By /s/ G. H. MORRIS,

By /s/ PAUL H. DENTON, Sec.,

Covenantees.

Dated this 31st day of July, 1953, LK, ACA.

[Endorsed]: Filed May 6, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor of the plaintiffs, Elmer Lysfjord and Walter R. Waldron, and against the defendant, The Flintkote Company, and fix the plaintiff' damages in the amount of ($50,000.00) Fifty Thousand and no/100.

Dated at Los Angeles, California, this 26th day of May, 1955.

/s/ DOYLE J. McDANIEL,
Foreman of the Jury.

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT N.O.V. AND FOR NEW TRIAL

Defendant The Flintkote Company moves the Court as follows:

1. To set aside the verdict of the jury in the above-entitled action and to enter judgment therein in favor of defendant and against plaintiffs in accordance with defendant's motion for a directed verdict at the close of all of the evidence upon the ground that plaintiffs have not introduced any substantial evidence tending to show that The Flintkote Company has done any act or acts in violation of the Antitrust Laws.

2. To grant a new trial in the above-entitled action on all of the issues therein upon the following grounds:

(a) Substantial and prejudicial errors of law were committed in the course of the trial.

(b) The verdict of the jury is not supported by legally sufficient evidence.

(c) The verdict of the jury is against the weight of the evidence.

(d) The damages assessed by the jury are excessive.

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant,
The Flintkote Company.

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

PETITION FOR ATTORNEY'S FEES AND COSTS

The petition of Alfred C. Ackerson respectfully shows and alleges:

That this petition is based upon Exhibit A attached hereto; upon the Points and Authorities at-

tached hereto, and upon the following representations of your petitioner:

That your petitioner is a duly qualified member of this Court, of the highest Court of California, of the United States District and Appellate Courts of the District of Columbia, and of the Supreme Court of the United States; that he has been engaged in the practice of prosecuting and defending antitrust cases and related cases since in or about the year 1934; that in the instant proceeding he has performed the services indicated in Exhibit A attached hereto and mentioned hereinabove in addition to other time not noted in said exhibit. That the attorney's fees to be awarded by the Court in this case are strictly of a contingent nature dependent entirely upon the succeess of the litigation and petitioner's efforts, and not payable otherwise; that your petitioner has spent a total minimum hours of office time in the preparation and trial of this case of 515½ hours and has spent a total of 21 days in Court in addition to a number of brief pre and post-trial conferences; that your petitioner is of the opinion that such services are of a specialized nature and under normal circumstances would be of the reasonable value of $40 per hour for work performed in the office and outside of the courtroom, and at a minimum rate of $250 per day for each four-hour Court day or portion thereof.

Your petitioner further alleges that the attorney's fee in the instant case is contingent upon the successful efforts of your petitioner and would not be

payable otherwise; that for this reason and in accordance with general principles of evaluating attorney's fees, the fee should be enhanced by between 50% and 100% over a guaranteed fee not based upon such a contingency.

Your petitioner further alleges with respect to the costs incurred and expended by plaintiffs in the instant proceeding that the original depositions of plaintiffs, Lysfjord and Waldron, consuming approximately three full days, while taken by certain of the contractor defendants and the Association defendant, were in fact purchased by counsel for the defendant Flintkote and were utilized by said defendant during the trial of the case. The cost to plaintiffs of copies of these depositions was in the sum of $118.30 and is included in the Cost Bill form under the title of "Costs Incident to Taking of Depositions." It is, therefore, your petitioner's position that both the cost of these depositions and the time consumed in taking them are proper items to be considered in the awarding of costs and affixing of attorney's fees.

In the tabulation of office and Court time consumed by petitioner in the preparation and trial of this case the Court's attention is directed to the fact that at least a part of the two conferences which plaintiffs' counsel had with Mr. Norman Sterry was in fact taken up in a discussion of the possibilities of settlement of the case. Likewise, the item of July 21, 1953, consisting of two hours, was

the actual conference which resulted in the payment of $20,000 to plaintiffs and the execution of the Covenant Not to Sue. Other time spent in this latter connection was not recorded and is not included in the tabulation of time.

The Court will, of course, take notice of the fact that the Court days enumerated in Exhibit A were for the most part not full four-hour Court sessions, but were for the most part three or three and one-half hour sessions. Your petitioner alleges that it has been his practice in the past, and he believes such practices to be fair to charge in matters of this kind a fee for one-half Court day for any appearance of whatever duration, and to charge for a full Court day for any appearance requiring over two hours' Court time.

Wherefore, your petitioner prays that this Court award as attorney's fees in the instant proceeding a minimum sum of $40,000, together with costs of Court as shown by the Cost Bill.

/s/ ALFRED C. ACKERSON,
Petitioner.

EXHIBIT A

Schedule of Time

Date (1952)	Remarks	Hours
4/29	Conference with plaintiffs regarding facts of case	1
6/17	Drafting Original Complaint	6

Date	Remarks	Hours
6/19	Factual study and drafting Complaint	7
6/20	Same	6
6/21	Revising Complaint	3
6/23	Factual preparation	6
7/28	Complaint revision, execution, and filing	3
8/25	Conference with plaintiffs	1
9/19	Defendants' depositions	6
9/22	Same	6
10/ 7	Deposition of Waldron	6
10/ 8	Preparation of Demands for Production of Documents	3
10/13	Depositions of plaintiffs	6
10/27	Conference, Judge's Chambers, with opposing counsel	1
11/ 3	Document search and analysis	1
11/ 5	Examination of Howard Company documents at Howard's offices	3
12/19	Argument on defendants' Motions for More Specific Statement, etc.	½ court day
(1953)		
1/ 5	Drafting Amended Complaint	7
1/ 6	Same	7
1/ 7	Same	7
1/ 8	Revising Amended Complaint	3
1/ 9	Further revisions of Amended Complaint	2½
1/16	Conference with plaintiffs	2
1/19	Miscellaneous office time	3
1/23	Factual preparation	2
1/28	Preparation in opposition to defendants' various motions	3
2/ 4	Office time	2
2/ 9	Argument re defendants' motions	½ court day
2/24	Argument re plaintiffs' further motions to Amended Complaint	½ court day
2/27	Conference with Norman Sterry, counsel for Shugart	2
3/ 6	Conference with Norman Sterry, counsel for Shugart	2
3/23	Court appearance re motions	½ court day
4/21	Preparation of opposition to defendants' Motions for More Definite Statement, etc.	1

Date	Remarks	Hours
4/22	Conferences and preparation of opposition to defendants' motions	4
4/27	Preparation of opposition to defendants' motions	2
4/28	Further preparation of opposition to defendants' motions	6
4/29	Same	5
5/ 1	Factual preparation and investigation	7
5/11	Argument of defendants' Motions to Amended Complaint	½ court day
5/21	Office work	2
5/25	Office work	2
6/12	Conference with defendant attorney Kaminar	3
6/15	Conference with plaintiffs	1
6/16	Conferences re filing of Answers	1
6/29	Conferences with plaintiffs and defense counsel	4
6/30	General office preparation	7
7/ 6	Preparation of Interrogatories	3
7/13	Preparation of plaintiffs' Interrogatories	7
7/29	Drafting covenant not to sue	2
7/31	Conferences with defense attorneys, etc., re settlement	2
8/12	Additional Interrogatories, Flintkote	2½
8/13	Flintkote and aabeta Demand for Production of Documents	3
11/ 7	Preparation of Answers to Flintkote Interrogatories	7
11/ 9	Same	7
11/10	Same	7
11/11	Case preparation	7
11/12	Same	7
11/13	Same	7
11/14	Same	3
11/16	Preparation of Interrogatories or Answers thereto	7
11/17	Same	7
11/19	Same	3
11/23	Further preparation of Interrogatories	1½

Date	Remarks	Hours
(1954)		
1/25	Inspection of aabeta records at aabeta company by Doty, etc.	3
2/12	Conference with Doty (no time noted)	
4/ 5	Defendants' Motion and trial setting	½ court day
9/30	Office conference with plaintiffs	1
10/19	Office conference with plaintiffs	1
10/22	Office conference, plaintiffs	2
(1955)		
4/26	Defendant's taking of plaintiffs' depositions	½ day
	Defendant's deposition, William Yeomans	2
3/ 4	Conference with plaintiffs re trial preparation	2
3/ 8	Trial preparation	7
3/10	Same	6
3/11	Same	3
3/17	Same	3
3/22	Same	7
3/23	Same	7
3/24	Same	7
3/25	Same	7
3/28	Same	7
3/29	Same	7
3/30	Same	7
3/31	Same	7
4/ 1	Trial preparation	3
4/15	Same	3
4/18	Same	7
4/23	Same	7
4/25	Trial preparation	7
4/26	Trial preparation	12
	(Note: 3 hours of this possibly duplication of time noted on p. 3 for same date.)	
4/28	Trial preparation	7
4/29	Same	7
4/30	Same	7
5/ 2	Preparation for trial and jury instructions	7
5/ 3	Same	7

Date	Remarks	Hours
5/ 4	Trial of case	1 court day
5/ 4	Trial preparation	3
5/ 5	Trial of case	1 court day
5/ 5	Trial preparation	4
5/ 6	Trial day	1 court day
5/ 6	Trial preparation	5
5/ 7	Trial preparation and briefs	7
5/ 8	Preparation of briefs and examination and organization of damage evidence	7
5/ 9	Trial day	1 court day
5/ 9	Trial preparation	4
5/10	Trial day	1 court day
5/10	Trial preparation	4
5/11	Trial day	1 court day
5/11	Trial preparation	4
5/12	Trial day	1 court day
5/12	Trial preparation	4
5/13	Trial day	1 court day
5/13	Trial preparation	4
5/14	Preparation of brief and examination of defendants' cases re motions	7
5/16	Trial day	1 court day
5/16	Trial preparation	4
5/17	Trial day	1 court day
5/17	Trial preparation	4
5/18	Trial day	1 court day
5/18	Trial preparation	4
5/19	Trial day	1 court day
5/19	Trial preparation	4
5/20	Trial day	1 court day
5/20	Same	4
5/21	Trial preparation	6
5/23	Trial day	1 court day
5/23	Trial preparation	4
5/24	Trial day	1 court day
5/24	Trial preparation	4
5/25	Trial day	1 court day
5/25	Trial preparation	4
5/26	Trial day	1 court day
5/26	Trial preparation	2

Date	Remarks	Hours
5/27	Preparation of draft of Petition for Attorney's fees, etc.	6
5/31	Petition for attorney's fees and Bill of Costs, and research re Covenant Not to Sue	6
6/ 2	Judgment forms	3
6/ 6	Judgment forms, legal memos, and miscellaneous research	6
6/ 7	Further research re application of $20,000	6

Totaling: 515½ hours' office preparation and 20½ court days.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the parties originally named as defendants herein, other than The Flintkote Company, paid to plaintiffs the sum of $20,000 upon delivery to said defendants of a covenant not to sue, dated July 31, 1953, copy of which was attached to defendant's Memorandum of Points and Authorities on Effect of "Covenant Not to Sue" filed herein on May 4, 1955.

Prior to the trial of the above-action, plaintiff and defendant The Flintkote Company agreed that said defendant would not offer before the jury evidence of said payment or of the execution of said document, and would withdraw its request for defendant's proposed Instruction No. 49.

This was done on the understanding that without prejudice to the rights and objections of either party and without prejudice to the right of either party to appeal from or seek reconsideration of an adverse ruling, the Court shall determine, with the same effect, all issues that would have been presented if evidence of said payment, and said document, had been offered by defendant before the jury, and if said Instruction No. 49 had been proposed by defendant.

It is expressly understood that any and all objections, jurisdictional or otherwise, to said offers in evidence or to proposed Instruction No. 49, and any and all arguments relating to the effect of said payment, are preserved unimpaired to plaintiffs, despite this stipulation, except the objection and argument that defendant waived any rights it otherwise would have had by not attempting to offer before the jury evidence of said payment or said document, or by withdrawing its request for said proposed Instruction No. 49.

Dated June 15, 1955.

McCUTCHEN, BLACK, HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ HAROLD A. BLACK,
Attorneys for Defendant,
The Flintkote Company.

ALFRED C. ACKERSON,

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

It Is So Ordered:

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT
JULY 8, 1955

Present: Hon. Ernest A. Tobin, District Judge.

Proceedings:

For hearing on defendant Flintkote's motion for judgment notwithstanding the verdict and for a new trial,

And for further proceedings re determination of treble damages, attorney's fees, and form of judgment to be entered.

Attorneys stipulate to submit petition, affidavit, and objections thereto re attorney's fees.

Attorney for defendant argues motion for judgment notwithstanding the verdict.

Attorney for plaintiff replies to defendant's argument.

Attorney for defendant argues motion for new trial.

It Is Ordered that defendant's motion for judgment notwithstanding the verdict and motion for new trial are denied, and that plaintiff's motion for attorneys' fees and costs and effect of payment of $20,000 on covenant not to sue will stand submitted.

JOHN A. CHILDRESS,
Clerk.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This action was commenced against many defendants. It appears on the Court docket as Elmer Lysfjord, et al., versus L. D. Reeder Co. of San Diego, et al. As all defendants except The Flintkote Company have been dismissed from this action, the Court refers to the case as captioned herein, The Flintkote Company being the only defendant now before the Court. Plaintiffs sued to recover damages sustained by them because of defendants' violation of the antitrust laws. Before trial, all defendants (except The Flintkote Company) collectively paid plaintiffs $20,000.00 as consideration for a covenant not to sue upon the claim asserted in the complaint.

The Flintkote Company did not obtain such a covenant and at the beginning of the trial it stipulated that the facts relating to said covenant not to sue would be withheld from the attention of the jury. Plaintiffs and The Flintkote Company stipulated that without prejudice to the right of either

party to appeal or otherwise attack an adverse ruling, the Court would determine the effect upon the final judgment of the partial settlement of the case memorialized by the covenant not to sue.

The case was tried before a jury which rendered a general verdict for the plaintiffs. Damages were therein fixed at $50,000.00. The jury was not informed of the treble damage aspects of the controversy.

Section 4 of the Clayton Act requires the Court to treble the damages. The Court must determine whether the $20,000.00 received by plaintiffs as consideration for the covenant should be deducted from the damages as fixed by the verdict at $50,000.00 before such damages are trebled, or whether the Court shall order the damages trebled and deduct $20,000.00 from the $150,000.00 as the trebled damages.

The law reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States * * * and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."[1]

The clear mandate of the statute directs that the collective liability of the tort obligors to the plaintiffs—that is, the total amount of the plaintiffs'

[1]Title 15, U.S.C.A., §15.

claim—be treble the amount of the plaintiffs' actual damages. Of this fact, the parties were well aware prior to the time of the covenant not to sue. Thus, if it be said that the covenantees in this instrument admitted no liability, and were merely buying their peace, it should be added that they not only were buying protection from costs and possible liability for damages suffered by the plaintiffs, but from treble the amount of those damages. The price paid represented not merely insulation from liability for the eventually determined damages of $50,000.00, but from the plaintiffs' claim of three times that sum. Plaintiffs expressly reserved their claims against all but these covenantees. Although the treble damage provision is punitive in function, and the trebled portion of the judgment cannot be regarded as representing recompense for actual damages suffered by the plaintiffs, niceties of semantics cannot obscure the intent of the covenantees to pay the $20,000.00 as consideration for relief from their total potential liability—that is, the damages plus the punitive addition.[2]

At early common law there could be but one judgment on a joint tort. Since the act of each tortfeasor acting in concert as in the instant case was the act of all, there was but one cause of action. This cause was "reduced to certainty" or merged

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[2]Courts may construe the intention of the parties in covenants not to sue. [Westover, J., in the treble damage action, Rector v. Warner Bros. Pictures, (1952) 102 F. Supp. 263.]

in the judgment; and the judgment against one, even though unsatisfied, barred any later action against another. When a judgment was obtained against one wrongdoer in this class, the other was said to have been released. This was actually not a release but a relief from a lawsuit by operation of law.[3] The distinct principle that the plaintiff was entitled to but one compensation for his loss, was also developed in the same period. By application of this equitable principle, a satisfaction of the plaintiff's claim, even by a stranger to the action, prevented its further enforcement. The first rule has been generally repudiated in the United States. The second is confused by the concept of "joint tortfeasors," and further complicated by the use of releases.[4] By indirect application of those equitable principles recognizing a unity of interest among defendants, and allowing the plaintiff but one compensation for his loss, the rule arose in joint tort cases that though a judgment against one alone did not bar a judgment against the other, a satisfaction of the judgment by one party did in fact release the other from liability.[5] The use of the rule providing that the release of one releases all was so widened in scope, that by its dogmatic application, courts have deprived many plaintiffs of effective enforcement of meritorious claims where plaintiffs

[3]Prosser: 25 Cal. Law Rev. 413.

[4]Ibid, note 3.

[5]Restatement of contracts, §120, sub-sec. 3(b).; Restatement of judgments, (1942) §95.

have received only partial satisfaction from one obligor.[6]

The injustice of the application of the rule of release became apparent to many courts. They began to hold valid those instruments of release which contained express reservation of rights against other tort obligors. Other courts avoided the unity of cause theory and simply construed the agreements as covenants not to sue.[7] Lawyers then began to use the express language of covenant not to sue or prosecute.

By reasoning underlying this instrument, plaintiffs are entitled to a full redress of their injuries, or a satisfaction. They may receive a portion of this satisfaction and at the same time settle a portion of their rights with one defendant, reserving their rights against the other tort obligors. Their rights are limited, however, by the rule that they are entitled to only one satisfaction. Thus, the other tort obligors are liable solely for the balance of their damages. "No one can be allowed to recover more than one payment in full for the same claim by any device."[8]

Thus arises the problem of what constitutes satisfaction of the claim. The rule is said to be clear:

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[6]Hawber v. Raley, 92 Cal. App. 701, 268 Pac. 943 (1928); 9 LRA 1066, 24 S. Calif. Law Rev. 466.

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[7]Kincheloe v. Retail Credit Co., Inc., 4 Cal. (2d) 21, 46 Pac. (2d) 971 (1935); 148 ALR 1270 (1944); 24 S. Cal. Law Rev. 466.

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[8]Williston on Contracts, § 388.

The payment of money must have been intended to be made on account of the injuries.[9] It is held by some authorities that unless proved otherwise, any amount of money received by a plaintiff as a result of such an agreement should be considered a payment toward satisfaction.[10]

Intention of the parties may properly be gleaned by courts from the language of the instrument.[11]

The pertinent provisions of the instrument in this case are:

"Whereas, the covenantors are desirous, both jointly and severally, * * * of discontinuing their action against the covenantees herein, and each of them, and the covenantees herein are desirous of having said action discontinued against each of them; and it is the joint and several desire of the covenantors and covenantees that the covenantees herein be assured that covenantors' action filed by them will be discontinued against the covenantees and each of them, and that no other action will be instituted by the covenantors against the covenantees, either jointly or severally, under any of the antitrust statutes or laws of the United States or of the State of California, or under the statutes or laws of any sovereignty whatsoever, on any of the matters set forth in the original or first amended

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[9]Restatement of Torts, § 885.

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[10]Restatement of Contracts, See § 120.

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[11]Rector v. Warner Bros. Pictures (1952), 102 F. Supp. 263.

complain or on matters accruing to and including the day of execution of this covenant;

* * *

"That the sum of Twenty Thousand Dollars ($20,000.00) paid herein to the covenantors as consideration for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only partial compensation therefore, and it is understood and agreed that the covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than those expressly named and designated herein, and that specifically covenantors retain their claims and causes of action against all other parties who are defendants in original and first amended complaints, including The Flintkote Company.

* * *

"That nothing herein set forth is intended to mean nor to be construed as any admission of liability on the part of any of the covenantees with respect to any of the matters alleged in the complaint and the first amended complaint.

"* * *."

Although the express mention of damages in the instrument might possibly be construed as a matter of form placed therein to preclude any implication of a release, the construction of the instru-

ment as a whole shows an intent of the parties that the consideration be applied as partial compensation to, or on account of, potential adjudicated damages.

As no evidence was offered, and no instruction given the jury informing them of the previous partial settlement, and the jury was limited to determination of the amount of actual damages, the verdict of $50,000.00 was determinative of the actual damages suffered by the plaintiffs. Treble damage actions are based on tort,[12] and ordinarily under tort rules a payment of this sum would constitute full satisfaction of the plaintiffs' claim. Thus, pursuant to the covenant not to sue, the partial compensation of $20,000.00 would be deducted immediately from the $50,000.00 verdict.[13] However, the treble damage provision is a remedy created by federal statute.[14] The remedies of the plaintiffs, and the liabilities of the tort obligor are determined under provisions of the Act. Section 4 of the Clayton Act (practically identical with Section 7 of the Sherman Act) provides that the plaintiff "* * * shall recover threefold the damage by him sustained * * *."[15] This provision allows actual dam-

[12]Rector v. Warner Bros. Pictures (1952), 102 F. Supp. 263; Ibid notes 2 and 12.

[13]McWhirter v. Otis Elevator Co. (1941), 40 F. Supp. 11.

[14]Title 15, U.S.C.A., § 15.

[15]Ibid.

ages to be determined under tort law by the trier of fact, but to this sum it super-imposes the additional amount, giving the plaintiffs in this case the total claim of $150,000.00. This is the amount of their satisfaction. It is true that the trebled portion of the judgment is punitive in nature and does not represent actual damages. Yet to hold that the plaintiffs are entitled to one dollar less than the full trebled damages of $150,000.00 would be a direct repudiation, or at least a contravention of the provisions of the statute under which this very cause was brought. The covenant not to sue may not be employed to shatter the clear intent of the statute. If the $20,000.00 sum were subtracted before trebling the verdict, the mature judgment, plus the partial settlement, could amount to an aggregate of no more than $110,000.00. This is only a fraction of the "one satisfaction" to which the plaintiffs are entitled under the Act.

The $20,000.00 sum must be credited to the defendant against the full claim of $150,000.00. To hold otherwise would perpetrate another instance in which a plaintiff has been deprived of a meritorious claim because he has received only partial satisfaction from other obligors.

Dated: This 9th day of November, 1955.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

MEMORANDUM

Re Attorney Fees.

By virtue of the provision of §15, Title 15, U.S.C.A., the Court is required to fix a reasonable attorney fee to be recovered by plaintiffs. It was agreed by both parties that the Court should fix this fee without referring any matter in connection with it to the jury except, of course, that the factual dispute relative to cause of action was referred to the jury because recovery of the fee is only possible if the plaintiffs prevail in the principal action. The plaintiffs did prevail therein.

The Court finds that $25,000.00 is a reasonable fee in the premises and has inserted that amount in the form of Judgment which has been lodged by plaintiffs. The Clerk is directed to enter that Judgment.

Dated: This 9th day of November, 1955.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed November 10, 1955.

In the District Court of the United States Southern District of California, Central Division

No. 14350-T

ELMER LYSFJORD, et al.,

Plaintiffs,

vs.

L. D. REEDER CO. OF SAN DIEGO, et al.,

Defendants.

JUDGMENT AFTER TRIAL BY JURY

This action having been tried, and a general verdict for the plaintiffs with damages of $50,000 having been duly rendered on the 26th day of May, 1955, and the Court having been required to treble the amount of damages under the provision of Section 4 of the Clayton Act (15 U.S.C.A. 15) and to add thereto a reasonable attorney's fee and costs,

It is, therefore, adjudged that said plaintiffs recover of said defendant The Flintkote Company the sum of $150,000, together with the sum of $25,000 as and for a reasonable attorney's fee, and the sum of $165.70 for the costs of suit.

It is further adjudged that the defendant shall have as a credit against the portion of this judgment relating to damages in the sum of $150,000 the sum of $20,000 heretofore received by plaintiffs in these proceedings pursuant to the terms of a

covenant not to sue between plaintiffs and other parties formerly defendants in this case.

Dated: This 9th day of November, 1955.

/s/ ERNEST A. TOLIN,
Judge of the District Court.

Lodged June 10, 1955.

[Endorsed]: Filed November 10, 1955.

Docketed and entered November 10, 1955.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 10th day of November, 1955, against defendant, The Flintkote Company, the clerk is requested to tax the following as costs:

Fees of the clerk	$ 15.00
(Allowed)	
Fees of the marshal	90.70
(Allowed)	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	449.20
(Disallowed, not for original)	
Fees for witnesses (itemized on reverse side)	40.00
(Allowed)	

Costs incident to taking of depositions..... 199.75
(Reporters costs on depositions. Amount stipulated $20 for original, rest for copies. $20 only allowed.)

Total $794.65

[Total Allowed]..... Taxed at $165.70

State of California,
County of Los Angeles—ss.

I, Alfred C. Ackerson, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to McCutchen, Black, Harnagel & Greene, defendant's attorneys, with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 22d day of November, 1955, at 10:00 a.m.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

Subscribed and sworn to before me this 15th day of November, 1955, at Los Angeles, California.

[Seal] /s/ JOYCE B. BALDWIN,
Notary Public.

My Commission Expires Jan. 11, 1956.

Costs are hereby taxed in the amount of $165.70 this 22nd day of November, 1955, and that amount included in the judgment.

/s/ JOHN A. CHILDRESS,
Clerk.

On 11/22/55 at taxing, G. Richard Doty appeared for The Flintkote Co., & Alfred C. Ackerson for plfs.

Witness Fees (computation, cf. 28 U. S. C. 1821 for statutory fees)

Name and Residence	Total Cost Each Witness
Richard E. Howard	$4.00
A. D. Hoppe 2733 Riverside Drive, L. A.	4.00
G. H. Morris 911 N. Sycamore, L. A.	4.00
L. D. Reeder 2900 Rowena, L. A.	4.00
R. W. Downer 325 N. Hoover, L. A.	4.00
Gustave Krause 2316 San Fernando Rd., L. A.	4.00
Paul H. Denton 228 N. Vermont	4.00

Name and Residence	Total Cost Each Witness
Howard C. Smith 3337 Casitas Ave., L. A.	$ 4.00
Robert Arnett	4.00
Olli Granni	4.00
Total	$40.00

[Endorsed]: Filed November 16, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Flintkote Company, one of the defendants in the captioned action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 11, 1955, and from the whole thereof.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ HAROLD A. BLACK,
Attorneys for Appellant,
The Flintkote Company.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, on November 11, 1955, judgment was entered in the above-entitled action in favor of plaintiffs and against defendant, The Flintkote Company, in the sum of $155,000; and

Whereas, on November 22, 1955, the clerk of said court taxed plaintiffs' costs in the above-entitled action in the sum of $165.70; and

Whereas, defendant, The Flintkote Company, intends to appeal from said judgment to the United States Court of Appeals for the Ninth Circuit and desires that execution of and any proceedings to enforce said judgment be stayed pending the determination of such appeal;

Now, Therefore, Federal Insurance Company, a New Jersey corporation having its head office in New York City, New York, and being qualified to transact a surety business in the State of California, hereby acknowledges that it, its successors and assigns, is bound to Elmer Lysfjord and Walter R. Waldron, plaintiffs in the above-entitled action, their heirs, successors and assigns, in the sum of Two Hundred Thousand Dollars ($200,000.00) conditioned that if defendant The Flintkote Company (or Federal Insurance Company as its surety) satisfies the judgment in the above-entitled action in full together with costs (including such additional attorney's fees, if any, as the court may award by

reason of the appeal) interest and damages for delay, if for any reason its appeal is dismissed or if the judgment is affirmed, or satisfies in full such modification of the judgment and such costs, interest, attorney's fees, and damages as the appellate court may adjudge and award, then this bond shall be void; otherwise to be and remain in full force and effect.

Federal Insurance Company consents and agrees that in case of default or contumacy on the part of the principal or surety, the court may, upon notice to it of not less than ten days, proceed summarily and render judgment against Federal Insurance Company in accordance with its obligation and award execution thereon.

Dated: December 8, 1955.

[Seal] FEDERAL INSURANCE COMPANY,

By /s/ GLEN HUNTSBERGER, JR.,
Its Attorney in Fact.

State of California
County of Los Angeles—ss.

On this 8th day of December in the year one thousand nine hundred and fifty-five before me, Florence Graeszel, a Notary Public in and for the County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared Glen Huntsberger, Jr., known to me to the the Attorney-in-Fact of Federal Insurance Company, the Corpora-

tion that executed the within instrument, and also known to me to be the person who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal in the County of Los Angeles the day and year in this certificate first above written.

[Seal] /s/ FLORENCE GRAESZEL,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires September 19, 1956.

Examined and recommended for approval as provided in Rule 8.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs.

I hereby approve the foregoing. Dated this ..... day of December, 1955.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-appellant The Flintkote Company hereby designates the following as the points on which it intends to rely on its appeal herein:

1. The court erred in denying defendant's motion for a directed verdict at the close of plaintiffs' case.

2. The court erred in denying defendant's motion for a directed verdict at the close of all the evidence.

3. The court erred in denying defendant's motion for judgment non obstante veredicto.

4. The court erred in denying defendant's motion for a new trial.

5. The court committed substantial and prejudicial errors of law in the course of the trial in connection with the admission of evidence.

6. The court committed substantial and prejudicial errors of law in the course of the trial in connection with the period for which damages might be recovered in this action.

7. The court committed substantial and prejudicial errors of law in the course of the trial in connection with its instructions to the jury.

8. The court erred in its determination of the effect of the payment of $20,000.00 to plaintiffs by

former defendants in this action in consideration of the execution by plaintiffs of a covenant not to sue.

9. The court erred in fixing the amount awarded to plaintiffs in respect of their attorney's fees.

10. The verdict of the jury is not supported by legally sufficient evidence.

11. The court lacked jurisdiction of the subject matter of the action.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ HAROLD A. BLACK,
Attorneys for Defendant-Appellant, The Flintkote Company.

Affidavit of service by mail attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

It is stipulated by and between plaintiffs-appellees and defendant-appellant The Flintkote Company, through their respective counsel, that the time within which the record on appeal must be

filed and within which the appeal must be docketed pursuant to the notice of appeal filed by defendant-appellant The Flintkote Company on December 8, 1955, be extended to and including January 31, 1956.

Dated January 16, 1956.

/s/ ALFRED C. ACKERSON,
Attorney for Plaintiffs-Appellees.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,

HAROLD A. BLACK,

G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Defendant-Appellant The Flintkote Company.

It is so ordered this 16th day of January 1956.

/s/ ERNEST A. TOLIN,
Judge.

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

DOCKET ENTRIES

1952

July 21—Fld complt Sherman Anti-Trust Act. Issd sums. Md JS 5 report.

1952

Aug. 1—Fld Sums. retn svd. as to L. D. Reeder Co. & L. D. Reeder, Harold E. Shugart Co., A. D. Hoppe, Paul H. Denton Co., Acoustical Contractors Assn., of So. Calif., Gus Krouse, Carroll Duncan, R. E. Howard, Roy Downer Co., & The Flintkote Co.

Aug. 8—Fld stip. & ord. thereon that defts. Acoustical contractors Assoc. of Sou. Calif. Inc. & R. E. Howard Co. have to & incl. 9/9/52 to appr.

Aug. 20—Fld stip. & ord. thereon that svce of sums. & compl. has been made on The Harold E. Shugart Co. Inc. & no svce on Diamond Head Screw Corp. or Joseph, Inc., that allegations as to Diamond Head Screw Corp. or Joseph, Inc., be deemed an allegation as to The Harold E. Shugart Co., Inc. & that defts The Harold E. Shugart Co., Inc. & G. H. Morris may have to & Incl. 9/9/52 to appear.

Aug. 20—Fld not. of defts Acoustical Contractors Assoc. of Sou. Calif. Inc. of Taking of depos of pltfs Elmer Lysfjord & Walter R. Waldron.

Sept. 9—Fld ANSWER of defts L. D. Reeder Co., R. E. Howard Co., R. W. Downer Co., Coast Insulating Products, Carroll Duncan db/a Acoustics, Inc. L. D. Reeder, Re. E. Howard, Roy Downer, Jr., Charles L.

1952

Newport, Gus Crouse, & Acoustical Contractors Assoc., of Sou. Calif., Inc., (formerly known as Acoustical Contractors Assoc. of Sou. Calif., Inc.). Fld ANSWER of defts. Paul H. Denton & A. D. Hoppe dba The Sound Control Co.

Sept. 9—Fld ANSWER of G. H. Morris & The Harold E. Shugart Co., Inc. Fld mot & not of mot. of deft The Flintkote Co. for more def. stmt, retble 9/29/52 at 10:00 AM with memo of pts & authos in sup. thereof.

Sept. 10—Fld stip & ord. thereon re cont. of depositions.

Sept. 24—Fld stip. & ord thereon that Mot. of Deft. for more Def stmt be contd from 9/29/52 to 11/3/52 at 10:00 AM.

Oct. 14—Fld mot & not of mot of plfs for prod of docs. retble 10/27/52, 10 AM., with memo of pts & auths in sup thereof.

Oct. 17—Fld defts objs to mot for prod of documents for inspection, etc.

Oct. 20—Fld defts objs to mot for prod of documents for insp., etc.

Oct. 27—Ent order striking plf's mot for production of documents for inspection, copying or photographing, off calendar.

Nov. 3—Ent ord striking mo of dft Flintkote Co. for more definte stmt off cal, and to be reset on 10 days' notice.

1953

Jan. 28—Fld mot & not of mot of plfs for leave to file 1st Amended Compl, retble 2/9/53, 10 AM. LODGED 1st Amended Compl with demand for jury trial thereon.

Feb. 9—Ent ord hrg on plfs mot for lv to file 1st amend compl cont to 3/16/53, 10 AM. Counsel notif.

Feb. 20—On ct's own mot ent ord advancg hrg on plfs mot for lv to file amend compl to 2/24/53 fr 3/16/53.

Feb. 24—Ent ord mot for lv to file 1st amend compl is grtd. Fld amend compl.

Feb. 26—Fld plfs not of grntg lv to file 1st amend compl.

Feb. 26—Ent ord on ct's own mo vac ord of 2/24/53 grantg plf lv to file amend compl, & ent ord restoring mo of plf to amend to cal Judge Tolin for 3/16/53. (C) Notif counsel.

Mar. 11—Fld oppos of cert dfts to plfs mot for lv to file 1st Amend Compl.

Mar. 13—On ct's own mot hrg on plfs mot for lv to file 1st amend compl set for 3/16/53 is cont to 3/23/53, 10 AM. Counsel notif.

Mar. 23—Ent ord grtg plfs mot for lv to file 1st amend compl. Plf counsel to draw formal ord.

Mar. 26—Fld ord grantg lv to file 1st Amend Compl.

1953

Apr. 15—Fld mot & not of mot of Flintkote Co. for sep stmt, more of def stm, to strike & dism retble 4/27/53 at 10 AM w memo of pts & authos in sup thereof.

Apr. 15—Fld stip & ord thereon re motions.

Apr. 24—Fld stip & ord thereon cont hrg on mot of deft The Flintkote Co for sep stmt etc. to 5/11/53.

May 7—Fld plfts oppos to mot of Flintkote Co for sep stmt & paragraphing more def stmt etc.

May 11—Ent prcdgs hrg deft Flintkote's mot for more def stmt to strike etc. Ent ord takg mots for more def stmt, separate stmt of claims & mot to strike under subm. Ent ord denyg mot to dism.

May 13—Ent ord defts mots req plf to mk sep stmt of claims for more def stmt & to strike cert portns of 1st amend compl htf taken under subm on 5/11/53 be & hereby are denied. Counsel notif.

May 18—Fld ans of defts Paul H. Denton Co, Paul H. Denton & A. D. Hoppe dba The Sound Control Co to 1st amended compl.

May 20—Fld ANSWER of defts L. D. Reeder Co of San Diego R. E. Howard Co, R. W. Downer Co, Coast Insulating Product Acoustics, Inc, L. D. E. Reeder, R. E.

1953

Howard, Roy Downer, Jr., Carroll Duncan, Chas. L. Newport, Gustave Krause & Acoustical Contractors Assn of So Calif to 1st amended complt.

May 21—Fld pltfs interrogs propd to deft Flintkote Co. (ex parte) Atty for Flintkote moves for extension time sd deft to ans ent ord Flintkote hv 20 days fr and after 5/23/53 to file its answer.

June 3—Fld stip & ord thereon that deft the Harold E. Shugart Co hv to & incl 6/15/53 in wh to ans 1st amend complt.

June 9—Fld mot of deft Flintkote Co for enlrgmt of time to ans 1st amend compl together with memo of pts & auths in suppt thereof & ord thereon that mot be heard 6/11/53 at 10 AM (Y) & svce of mot to be made not later than 12 noon Wed 6/10/53.

June 10—Fld deft Flintkote Co's affid of svce of mot for enlrgmt of time etc as to Alfred C. Ackerson. Fld deft Flintkote Co's mot & not of mot retble 6/22/53 at 10 AM for (1) to strike & dism or (2) to compel ans to interrogs (3) to enlarge time to ans 1st amended complt together with affid of G. Richard Doty memo of pts & auths in suppt thereof.

June 11—Ent procs (Y) hrg mot deft Flintkote fld 6/9/53 for enlargmt time to ans. Ent ord sd deft hv until 5 PM 6/25/53 to ans.

1953

June 13—Fld notice of entry of order denyg mo for sep stmt etc.

June 15—Fld ANSWER of defts G. H. Morris & the Harold E. Shugart Co. to 1st amended complt.

June 16—Fld ANSWER of pltfs to interrogs of deft Flintkote Co. Fld stmt of Walter R. Waldon adopting answers of pltf Lysfjord to deft Flintkote Co's interrogs.

June 17—Fld pltfs oppn to mot of deft Flintkote Co. to strike or disms or to compel ans to interrogs.

June 22—Ent proc hrg mot of deft Flintkote Co to strike and dismiss or to compel answer to interrogs & to enlarge time to answer 1st amend compl & ent ord deny sd mot w/o prej to submisn of fur interrogs (BH).

June 26—Fld ANSWER of Flintkote Co to 1st amended complt.

July 31—Fld dktd & ent stip & ord dism w/o prej as to defts L. D. Reeder Co. of San Diego, R. E. Howard Co, The Harold E. Shurgart Co, Inc., R. W. Downer Co, Coast Insulating Products, A. D. Hoppe, The Paul H. Denton Co, Acoustics, Inc., L. E. Reeder, R. E. Howard, G. H. Morris, Roy Downer, Jr., Carroll Duncan, Charles L. Newport, Gustave Krause, Paul H. Denton, Acoustical Contractors Asson of Sou Calif Inc, et al, and w/o costs.

1953

Aug. 18—Fld interrogs propd to deft Flintkote Co by pltf Nos. 1 thru 13.

Aug. 19—Fld pltfs mot & not of mot retble 9/28/53, 10 AM for prodn of docmts together with memo of pts & auths in suppt thereof.

Aug. 25—Fld stip enlarging time to ans interrogs by deft Flintkote Co to 10/1/53 & ord thereon.

Oct. 1—Fld stip & ord thereon that deft Flintkote Co hv to & incl 10/15/53 in wh to ans interrogs Nos. 1 thru 13.

Oct. 16—Fld ans deft the Flintkote Co. to interrogs Nos. 1 thru 13. Fld interrogs prop to pltfs by deft Flintkote Nos. 32 thru 73.

Oct. 26—Fld pltf's stip & ord thereon that pltfs may hv to & incl 11/15/53 in wh to serv ans to "Interrogs propounded to pltfs by deft Flintkote Co."

Nov. 17—Fld stip & ord thereon that pltfs hv to & incl 12/7/53 in wh to ans defts interrogs.

1954

Mar. 1—Fld admission of rect of copy of ans of plfs to deft Flintkote Co's interrogs. Fld plf's ans to interrogs propd by deft Flintkote Co.

Mar. 13—Mld notice to counsel placg on settg cal 4/5/54 at 10 AM.

1954

Mar. 25—Fld deft Flintkote Co's not of mot retble 4/5/54 at 10 AM for ord reqg proper ans to interrogs; with memo of pts & auths in suppt thereof.

Apr. 5—Ent procdgs hrg deft Flintkote's mot for ord requiring proper ans to interrog. Ent ord Ct will draw ord re determintn whether plfs ans are satis or not. Ent fur ord settg for trial off cal.

July 30—Ent ord deft Flintkote's mot for ord requiring ans to Flintkote's interrog. Nos. 39 thru 73, htf taken under subm, is denied without prej to Flintkote to submit fur more specific interrog covering the same subjects. Counsel notif.

Oct. 7—On cts own mot ent ord settg case for trial 4/19/55, 10 AM.. Counsel notif.

Oct. 8—Fld plfs not of taking depos.

1955

Jan. 5—Fld stip & ord thereon that trial now set for 4/19/55 be contd to 4/26/55 at 10a.

Feb. 3—Fld Deposn of Robt E. Rayland tkn 10/23/54.

Mar. 11—Ent ord (ct's own mot) trial contd fr 4/26/55 to 5/4/55, 9:30 AM. Counsel notif.

Apr. 26—Fld Not of takg depos & to prod docs at the takg of depos.

Apr. 29—Fld Jury instrs requested by pltfs.

1955

May 3—Fld defts proposed jury instrns.

May 4—Ent prcdgs jury trial. Jury impaneled. Ent ord fur trial cont to 5/5/55 10 AM.

May 5—Ent prcdgs fur jury trial. Sw 1 wit for plf. Fld 14 exbs for plf. Ent ord fur trial cont to 5/6/55 9:30 AM.

May 6—Ent prcdgs fur jury trial. Fld 14 exbs for pfl. Fld 4 exbs for dft. Ent ord fur trial cont to 5/9/55 2 PM. Fld dft Flintkote's memo of pts & auths on effect of "Covenant not to sue."

May 9—Ent prcdgs fur jury trial. Sw 7 wits for plfs. Fld 8 exbs for plf. Fld plfs memo re measure of damages (1) as to time that can be covered & (2) as to type of evid to prove unliquidated damages. Fld Flintkote's supl memo of pts & auths on effect of "Covenant not to sue" & memo of pts & auths on the recoverability of damages occurring after institution of action. Ent ord fur trial cont to 5/10/55 1:30 PM.

May 10—Ent prcdgs fur jury trial. Fld 1 exb for plf. Ent ord fur trial cont 5/11/55 1:45 PM. Fld Flintkote's memo of pts & auths in reply to plfs memo re measure of damages, etc.

May 11—Ent prcdgs fur jury trial. Sw 1 wit for plf. Fld 5 exbs for plf. Fld 4 exbs for deft. Ent ord fur trial cont 5/12/55 1:30 PM.

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May 12—Fld plfs prof of antitrust case by circumstantial evid. Ent procdgs fur jury trial. Ent ord fur trial contd 5/13/55 1:30 PM.

May 13—Ent proc fur jury trial. Fld 1 exb for plf. Plf rests. Atty for deft moves for directed verd & to strike cert evid. Ent ord rulg on sd mots & fur trial cont to 5/17/55, 1:30 PM. Fld deft Flintkote Co's memo of pts & auths in suppt of mot for directed verdict & to strike cert evid. Fld deft Flintkote's memo of pts & auths in reply to plf's memo in oppon to mot for directed verdict.

May 16—Ent procs fur jury trial. Ent ord defts mot for directed verdict & mot to strike cert evid is denied. Sw 1 wtn for deft. Fld 1 exb for deft. Ent ord fur trial cont to 5/17/55, 1:30 PM.

May 17—Ent proc fur jury trial. Fld 5 exbs for plf. Ent ord fur trial cont 5/18/55, 2 PM.

May 18—Ent procs fur jury trial. Sw 1 wit for deft. Fld 1 exb for plf. Ent ord fur trial cont 5/19/55, 1:30 PM.

May 19—Ent procdgs fur jury trial. Sw 3 wits for dft. Fld 1 exb for dft. Ent ord fur trial cont 5/20/55, 1:30 PM.

May 20—Ent fur procdgs jury trial. Sw 4 wits for dft. Ent ord fur trial cont 5/23/55, 10:30 AM.

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May 23—Ent prcdgs fur jury trial. Sw 1 wit for deft. Ent ord fur trial cont 5/24/55, 1:30 PM.

May 24—Ent prcdgs fur jury trial. Fld 3 exbs for dft. Sw 1 wit for dft. Atty plf moves to amend prayer amend compl, mot grtd. compl amended by interlineation. Both sides rest. Atty for dft renews mot for directed verd & to strike cert evid ent ord mots ea of them denied. Ent ord fur trial cont 5/25/55, 2 PM. Fld deft Flintkote's prop jury instrcs (revisions & withdrawals).

May 25—Ent prcdgs fur jury trial. Ent ord fur trial cont 5/26/55, 9:00 AM.

May 26—Ent prcdgs fur jury trial. Jury retns verd fv plfs & against deft, awarding plfs $50,000. Fld verd.

June 1—Ent ord fur hrg on determination of treble damages, attys fees & form of judgt to be ent on cal 7/8/55, 1:30 PM.

June 1—Fld stip & ord for withdrawal of plfs exb 42 (Genl Ledger) Ledger released to Walter R. Waldron. ld deft Flintkotes mot & not of mot retlbe 7/8/55, 1:30 PM for jdgmt NOV & for new trial with memo of pts & auths in suppt thereof.

June 10—Lodged (3) proposed judgts after trial by jury of plfts. Lodged plfs proposed judgt for attys fees & costs.

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June 15—Lodged plfs jdgmt after trial by jry. Fld plfs suppl memo re disposn of partial settlemt of case. Fld plfs memo re defts (right to deduct payment of $20,000 for jdgmt). Fld plfts petn for atty fees & costs.

June 20—Fld stip & ord thereon that defts other than The Flintkote Co paid to plfs sums of $20,000 upon delivery to sd defts of convenant not to sue, dtd 7/31/53 attached to defts memo of pts & auths on effect of "Convenant Not to Sue" fld 5/4/55.

June 30—Fld deft Flintkote's supplmtl memo of pts & auths in suppt of Mot for jdgmt N.O.V. Fld deft Flintkote's supplemtl memo of pts & auths in suppt of Mot for new trial. Fld their affid of svce thereon. Fld Deft Flintkote Co's 2nd supplemental memo of pts & auths on effect of covenant not to sue.

July 5—Fld deft Flintkote's memo of pts & auths re attys fees & costs.

July 8—Lodged deft's proposed judgt after trial by jury. Ent prcdgs hrg defts mot for judgt notwithstanding verd & mot for new trial. Ent ord sd mots denied. Ent ord plfs petn for attys fees & costs & determn. of effect of paymt of $20,000 on covenant not to sue stand subm.

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Nov. 10—Fld memo of decision re effect of pymt of $20,000 on covenant not to sue. Fld memo of decision re: attys fees. Mld cys to counsel. Fld, dktd & ent judg fv plfts against deft The Flintkote Co. the sum of $150,000.00 and atty fees of $25,000.00 together with costs, sd deft to hv credit on sd judg in sum of $20,000.00 htf pd plf etc. Not attys. JS6.

Nov. 16—Fld plfs Bill of Costs.

Nov. 22—Taxed costs by clk on hrg at $165.70, & ent in judgmt.

Dec. 8—Fld Appellants not of appeal (Deft The Flintkote Co). Mld copy to Alfred C. Ackerson Rm 770, 417 S. Hill St., LA 13, Calif. Fld supersedeas bond.

Dec. 20—Fld deft-appelt's stmt of pts on appeal & designation of contents of rec on app.

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Jan. 5—Fld ptlf-appellees' design of add'l record on appeal.

Jan. 16—Fld stip & ord thereon extending to & incldg 1/31/56 time for deft-appellant to file record on appeal & for docketing appeal.

Jan. 17—Fld ord for flg of cert deft's req. jury instrucs & cert of plfs substd prop jury instrucs nunc pro tunc.

In the United States District Court
Southern District of California
Central Division

No. 14,350-T

ELMER LYSFJORD, et al.,

Plaintiffs,

vs.

L. D. REEDER CO. OF SAN DIEGO, et al.,

Defendants.

Honorable Ernest A. Tolin, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(In Chambers)

Appearances:

For the Plaintiffs:
ALFRED C. ACKERSON.

For the Defendant The Flintkote Company:
McCUTCHEN, BLACK, HARNAGEL & GREENE, By
HAROLD A. BLACK, and
G. RICHARD DOTY.

May 4, 1955—9:20 A.M.

The Court: Good morning, counsel.

I will make a brief statement of what the Court understands counsel have presented in chambers this morning in advance of the beginning of the

case, Mr. Black having asked for a conference in chambers.

Now, gentlemen, if I mistate or don't fully state what has gone on before, please fill me in, because I want the record to be complete on it.

This action was commenced against several defendants. All but one have been subject to an order of dismissal, which was entered upon stipulation of the parties for dismissal. The particular defendant before the Court today, not being a party to that stipulation or to the order, is The Flintkote Company.

It has now been brought to the Court's attention for the first time that those defendants who were the subject of the order of dismissal paid $20,000.00 to the plaintiffs in exchange for a covenant not to sue further. The question arises as to how this matter shall be brought to the attention of the jury, if at all.

The Court understands it is to be the agreement of the attorney for the plaintiffs and the attorney for the defendant Flintkote, that Flintkote, being the defendant on trial [B*] today, that the Court at the time of impaneling the venire, inform the prospective jurors of the fact there has been a settlement of the action as between the plaintiffs and all defendants except the defendant Flintkote, but the Court shall not state the monetary consideration, keeping that away from the attention of the jury.

The Court will, of course, give the usual state-

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

ments concerning the rules applicable, that the fact of settlement by these defendants who have settled, does not create an inference against the defendant on trial, just by the reason of the mere fact of settlement, and the jury is not to infer anything for or against either of the parties to the controversy to be tried today merely because certain of the persons who were former parties to the suit have settled their dispute.

Have I said it correctly?

Mr. Black: The further statement that similarly the fact that those parties made a settlement does not create an inference that they themselves were liable in any way.

The Court: Yes. I think that should be included. I had that in mind when I said I would state the usual rules applicable to situations of this kind.

Mr. Ackerson: I think it should be stated, also, Your Honor, there can be no inference drawn—they should not consider the fact of the amount of settlement, and there [C] should be no inference drawn that any portion of the total liability was paid, any particular portion of the total liability. They are not to concern themselves with that.

The Court: In questioning the venire I will attempt to cover what each of you have just stated, and if I do not do it fully, don't be backward about reminding me. I don't think you will be, but I will just state now for the record that you are invited to point out any deficiencies in the questioning.

I want both sides to feel that the jury is properly impaneled and its members properly informed of

the matters you have just brought to my attention.

Mr. Ackerson: Along that line, there is a question I usually like to have asked in a case of this type, where so many parties are involved, and that is to the effect of whether or not any of the panel are acquainted with or have had business relations with, and so on, either me, Mr. Black or any of the defendants or the plaintiffs.

For your convenience I have drawn up a list so you wouldn't have to refer to a number of documents to get them. This thought occurred to me last night.

Mr. Black: We had exactly the same thought.

The Court: It occurred to me on Sunday.

Mr. Ackerson: We had drawn up a proposed draft of this statement to the jury regarding the settlement. I don't know whether Mr. Black would prefer to have it or if that would be [D] a convenience to you.

Mr. Black: I think the Court has covered the matter.

Mr. Ackerson: I think it is covered. It is just as a matter of convenience.

The Court: I think juries stay awake longer if a judge can get himself into sufficient frame of mind to ad lib these.

Mr. Black: Yes, they are infinitely more effective.

Mr. Ackerson: I think so, too.

The Court: I tried to do it that way. If it appears, as we go along, my language is unfortunate,

please point out wherein it can be improved or corrected.

Another matter counsel have presented is the question of opening statements. Mr. Ackerson, of course, expects to give an opening statement immediately after the jury has been sworn to try the case, it being understood that the lengthy Complaint and Answer need not be read to the jury by the judge or clerk.

Mr. Black, for the defendant, feels that he should at that time, that is, immediately after Mr. Ackerson has finished his opening statement, point out to the jury the points which have been alleged by the plaintiffs, which the defendant denies, but not give a summary of what he expects to prove, other than to state what is in issue at that time, but to give a full defendant's opening statement after the plaintiffs have completed the presentation of their evidence. [E]

Now, have I stated that correctly, gentlemen?

Mr. Ackerson: That is satisfactory.

Mr. Black: Yes, that is my understanding.

The Court: That will be deemed a stipulation then?

Mr. Ackerson: Yes.

Mr. Black: So stipulated.

Mr. Ackerson: There is one other question. I don't know whether it is necessary or not. We still have a conspiracy here and co-conspirators in the form of these defendants who have been dismissed. I am wondering whether or not it would, just for the purposes of the record, that the Complaint may

be deemed to have been amended to use the word "co-conspirators" with reference to these contractors, wherever we have designated them as defendants.

Do you think that would clarify that?

The Court: You are undertaking, I take it, Mr. Ackerson, to bring to the minds of the jury these defendants, although they have been dismissed, are still claimed to be conspirators?

Mr. Ackerson: Are still conspirators, in the same sense they were as defendants.

Mr. Black: Well, I have no objection to that in principle, but I am not sure that mechanically that quite achieves it, without examining the text of it. It might produce some really curious grammatical statements. [F]

Mr. Ackerson: We could limit the stipulation to a stipulation between counsel, then these dismissed defendants can be——

Mr. Black: Can be referred to——

Mr. Ackerson: Yes.

Mr. Black: ——without admitting——

The Court: That would be the law and would be necessary.

Mr. Ackerson: It would be necessary.

Mr. Black: Yes.

The Court: Even if counsel didn't agree, I think the Court would have to do that.

Mr. Ackerson: That is undoubtedly true.

Mr. Black: I think in that same connection it now appears that it would be almost imperative that plaintiffs' instructions be recast.

Mr. Ackerson: A few of them will have to be recast.

Mr. Black: Because in some instances we even have a situation where you tell the jury that they could find against some but not all the defendants, which, of course, now becomes——

Mr. Ackerson: There are about six instructions, I believe, that will have to be. I am in the process of doing that.

The Court: We will not reach the instruction problem this week. [G]

Mr. Black: That is right.

Mr. Ackerson: I thought that could be done over the week end.

Mr. Black: Similarly, we have an instruction on this covenant not to sue, which, obviously, will have to be withdrawn. That can be done later.

The Court: Before the arguments commence, I think we will have to have an instruction conference.

Mr. Black: Very well.

The Court: I don't follow the custom, or I haven't heretofore, that some of the judges do, of going over each individual instruction. That can become an interminable thing.

I remember a case we had before Judge O'Connor, in which the instruction conference took about three days. It is just an invitation to everyone to debate every instruction, and the first thing we know we are beginning to debate instructions that were withdrawn by Judge James, when all of us were young, probably not yet members of the Bar.

But I think we ought to have a conference which will aim at, as the mechanic would say, getting the bugs out of the charges that have been submitted.

Mr. Black: That might be highly desirable.

The Court: There is one thing about the Court simply letting jurors be excused, where perhaps the law would not. I notice that the statute says, "No juror shall be excused [H] because of hardship, unless it be an extreme hardship."

I have always taken the attitude that if a juror has some particular event, either occurring or about to occur in his life or family, personal life, which would be such that his mind would tend to drift toward that, and he would find it difficult to give the case full attention, that I just excuse him.

I ask a general question, if anyone called that day has that situation. Only once did I find what I thought was a taking advantage of it, when half the courtroom got up and walked out. Only once did they do it. Generally, they are pretty conscientious.

Mr. Ackerson: I think so.

The Court: A couple of weeks ago on impaneling a jury in a lands case in Fresno, I made that kind of a statement and two of the jurors got up and made little statements about their being very interested in a particular irrigation hearing which was being conducted in another room of the building, and that they were directly affected by the results and might at some time possibly be witnesses, although they hadn't been subpoenaed, and so I excused them right off.

And then counsel came running up and took an exception to my having done so, because the panel, they said, was so small, they wanted jurors to be excused only where the law required it. [I]

I thought I would inquire of you now, before we get into the courtroom, if you have any objection to my being conservatively liberal——

Mr. Ackerson: I have none.

Mr. Black: I have none.

The Court: ——on excusing jurors who might have other things on their minds.

Mr. Black: I have none.

Mr. Ackerson: I have none, either.

The Court: Is there anything else we should confer about?

Mr. Black: Yes, there is one other subject I think we should perhaps bring up at this time, and that is the matter of how to deal with the law issues and the equitable issues if we get there in this case.

As Your Honor knows, this case is for damages and an injunction. I think, under the authorities, it is very clear that the issues are not identical on those two matters.

And that, further, the equitable issues, if any remain, should be, in the normal course, handled by the Court, without the jury, after the jury has found on the non-legal issues.

Specifically, under the law issues, it is irrelevant as to what has been going on since the filing of the complaint with respect to conspiracies and restraints and what not. Whereas, under the equitable issues, that is one of the most [J] important things

the Court has to decide, as to whether there is still a threat of a conspiracy and so forth.

I think it is confusing to the jury to have those two things interwoven at a single trial.

Mr. Ackerson: I would suggest that we proceed, more or less normally dispose of the liability and the damage question. I agree that after that is disposed of, why, any question of injunction can be decided by the Court.

Mr. Black: And perhaps if additional testimony, in the Court's discretion, he feels is needed, it can then be offered.

Mr. Ackerson: Yes.

The Court: It might occur that you will have a witness here on the stand who will have finished testifying as to all that he should on the law issue and counsel would feel that they would like to ask a few questions while the witness is present, and which might tend to confuse the issue if that evidence be heard by the jury, but you would like to get it in while the witness is here, without having to bring him back.

If any such situation occurs, we can take such testimony while the jury takes a recess.

I take it that any particular enlargements of testimony relating to the equitable issues, which would come in under the procedure just suggested, would be brief.

Mr. Black: I think so.

The Court: And if you have any extensive questioning of [K] any particular witness, it would be

necessary, or, that might be taken up after the jury has retired.

Mr. Ackerson: I think so.

Mr. Black: I think we can safely leave that to Your Honor's discretion.

Mr. Ackerson: I doubt, it would be improbable that the situation would arise, but it may.

Mr. Black: I think it can be dealt with in that fashion. Counsel on both sides thought it more convenient to bring the witness back, we would perhaps be entitled to do that.

The Court: You don't like to have the jury just sitting in the jury room, that is, for long periods of time. It is to everyone's interest to keep the jury in a good frame of mind.

Mr. Black: Yes. We have a motion on that subject. For the record, does Your Honor feel it is desirable to present it on the matter of separate trial? Perhaps, for the record, it is just as well to make that motion. I don't think there will be any opposition to it.

The Court: It is being filed now?

Mr. Black: Yes, it is being filed now.

Mr. Ackerson: I move the Court that each side be permitted five challenges, peremptory challenges.

The Court: Any objection, Mr. Black? [L]

Mr. Black: No objection.

The Court: Motion granted, five peremptory challenges.

With respect to the motion to separate legal and equitable issues for trial, the Court will receive all evidence as to all the issues seriatim, that is, one

witness after another, and if it becomes appropriate to separate the examination of a particular witness, reserving part of it until after the jury has retired, we will do that.

If it becomes appropriate to excuse the jury briefly, while we take a few questions from a witness, whose prolonged attendance would not be necessary to the trial of the equitable issues, we will follow that method.

In other words, we will try to have the Court assimilate the equitable issues, the evidence applicable to the equitable phases of the case, from the general presentation, and we will then supplement it by taking further evidence after the retirement of the jury, if that becomes indicated.

Mr. Black: There will be no objection to that procedure.

Mr. Ackerson: No objection.

The Court: Are there any other issues we ought to take up now?

Mr. Ackerson: I think that covers it.

Mr. Black: That covers it.

(Whereupon, at 9:35 o'clock a.m., Wednesday, May 4, 1955, an adjournment was taken.)

May 5, 1955—10:00 A.M.

The Court: Good morning.

The jury and alternates being present, the litigants here, you may proceed with your argument —I don't mean your argument. I mean your opening statement.

Mr. Ackerson: I will try not to make it argumentative.

The Court: For your information, we will take the morning recess at exactly 11:00 o'clock.

Mr. Ackerson: May it please the Court, Mr. Black, Mr. Doty, ladies and gentlemen of the jury, as His Honor explained to you yesterday, it is customary in a case like this for counsel to give what is known as an opening statement.

And you will also recall that His Honor told you what I have to say here this morning is, of course, not evidence, and that it is not to be considered by you as evidence.

The purpose of an opening statement is to let the jury know what each side intends to prove by competent evidence, so that you can better follow that evidence and evaluate it as it comes in.

It is also to enable you to get abreast of the problem which you ordinarily don't do up to this stage of the game.

Also, what I say here, other than what the charge is, will be based, in my opinion, upon the evidence which you [2*] will hear throughout this case. I want that understood, without repeating it every other sentence, as I go through here. Sometimes you say the evidence will prove or the evidence will show, and the statements I make, other than a reference to the Complaint in this case, I am telling you now, in my opinion, that the evidence will sustain.

Now, I think in order to understand this case I should, to begin with, state the evidence which we

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

think will pertain to the industry as a whole, that is, the manufacturing industry, including the defendant Flintkote, and the manner of distribution, because this evidence will show that the principle competitive tile, that is, the type of tile is rather limited, both as to source and as to application.

Now, His Honor called your attention to this tile in the building here, and if I consider my client an expert, I have to disagree with His Honor. My client tells me this is very excellent, specialty tile.

The Court: I was just being, speaking facetiously. Unless we are facetious once in a while, these proceedings get awfully dull.

Mr. Ackerson: Yes, Your Honor. The purpose of my being a little facetious this morning is this is not the competitive tile we are talking about. The competitive tile involved in this case is the type of tile you see in office buildings, chain stores, hospitals, schools, and so on. It [3] is that 12 by 12 perforated tile you see on the ceilings, and it is the common type, in other words.

Now, in that connection the evidence will show that the vast majority of acoustical tile jobs done in this area and other areas, the specifications requiring that tile to have what they call an A.M.A. rating. Now, A.M.A. stands for American Materials Association, I believe, or American Acoustical Association. Anyway, it is a grading organization, composed of manufacturers, technicians, and so on, and they rate the tile for its sound-deadening abilities.

So I believe the evidence will show that in this

area the manufacturers who supply that type of tile which will meet the specifications of the great majority of the jobs is manufactured by about five acoustical tile manufacturers, other than the defendant Flintkote. And this Flintkote tile, that we are talking about, does have an A.M.A. rating and is acceptable to architects and general contractors alike. [4]

Now this tile, Flintkote tile, is manufactured in Hilo, Territory of Hawaii, and is sold ordinarily to acoustical contractors, such as my client Mr. Waldron and his partner, Mr. Lysfjord.

This sale is made in what we call a drop shipment in the grocery field, or something of that type of industry. In other words, it is purchased by these acoustical tile contractors in carload lots, it is shipped direct, we will say, from Hawaii, by both being consigned directly to, as in our case, the aabeta company. Then it is unloaded by regularly established trucking lines into the aabeta company's warehouse or the acoustical contractor's warehouse who purchased it. That is true, generally speaking, of each of the other manufacturers. They sell direct to acoustical tile contractors in carload lots.

The evidence will likewise show that on this 12x12 one-half inch acoustical tile, just a common competitive variety, and without which an acoustical tile contractor couldn't operate competitively, that the competitive price for that tile is identical with each manufacturer regardless of the source of the manufacturing facilities. Each of the plaintiffs' competitors, the evidence will show, regardless of

their source of the tile, whether it was Flintkote, Armstrong, U. S. Gyp, National Gyp, Firtex, or the rest of them, that they each could buy this necessary tile at, I [5] believe, 10 cents a square foot.

Now in 1950, '51 and '52, the crucial period here, the evidence will show that all of these manufacturers of this A.M.A. approved tile sold exclusively to one or more members of the Acoustical Tile Contractors Association, which is one of the alleged co-conspirators here.

In many instances the manufacturer would sell to one of these members of this Association, who also could purchase one or more other brands of the same tile from competitors of the manufacturer. Thus the evidence will show that at the time Flintkote agreed to sell tile to the plaintiffs here they were at the same time selling that tile to Howard & Company, one of the other named co-conspirators.

Howard & Company also had U. S. Gypsum tile, a competing brand, and both brands were acceptable on these public building projects constituting most of the tile work.

Flintkote likewise sold—and I could be wrong on one of these names but not numbers—I believe it sold at the same time to Acoustics, Inc., another alleged co-conspirator, and I believe that Acoustics, Inc., likewise had a competitive brand of tile, that is, competitive to Flintkote's tile.

Mr. Black: Pardon me, Mr. Ackerson. I don't suppose it matters but that came after the events.

Mr. Ackerson: Who was it?

Mr. Black: Sound Control. [6]

Mr. Ackerson: Thank you, Mr. Black. I was a little bit doubtful.

At that time it was Sound Control who was likewise an alleged co-conspirator.

I believe that Flintkote at that time had a third outlet for its tile in this area, the name of which I am not certain.

Can you help me on that, Mr. Black?

Mr. Black: Coast Insulating.

Mr. Ackerson: Coast Insulating was the third one, and Coast Insulating is likewise named as a co-conspirator.

Now I believe Coast Insulating likewise handled the tile of Flintkote's competitor.

So here you had three competitors of the plaintiffs, who had a choice of what tile they could put into a building, they had two brands of approved tile, they could use either Flintkote's tile or they could use Armstrong tile or U. S. Gyp tile, whichever happened to be the other brand.

Now before I progress chronologically, the alleged members of the Acoustical Contractors Association were those same names which His Honor read to you ladies and gentlemen yesterday. Perhaps I might just repeat the company's names so that you might keep them in mind.

They were the L. D. Reeder Company, R. E. Howard Company, The Harold E. Shugart Company, the R. W. Downer Company, [7] Coast Insulating Products, A. D. Hoppe, doing business under a fictitious name, Paul H. Denton, Acoustics, Inc.

Now this Association was formed I believe sometime in the latter part of 1951, but I think the evidence will show that prior to that time there was an informal organization, unincorporated, at which these same people attended regular meetings, and I believe the evidence will show further that at these meetings the price to be charged by acoustical contractors to public builders, general contractors, was fixed and set by mutual understanding.

I believe further that the evidence will show along that line that they published a regular markup price list to be followed by acoustical tile contractors in submitting bids.

At the same time and during this informal stage of this association, the evidence will show that the system worked something as follows: that these so-called competing tile contractors would submit their bids in advance to a man who was employed by the group. That man would automatically eliminate the low bid and award the bid to the second low bidder.

That went on for a little while until they became more formal. After that the evidence will show there was an absolute allocation of bids. [8]

In other words, the bids were rotated. They were allocated. Sometimes without respect to any bona fide bid at all. If it was Downer's turn to get a bid, they got it.

The competing tile contractors had a formula or a number or a percentage, but whatever it was it meant that when they found out what Downer had bid, the other company would increase their bid three and one-half per cent and another com-

pany would increase their bid seven and one-half per cent, so that Downer had to be low.

That was the general operation that acoustical tile contractors industry engaged in when these plaintiffs attempted to enter the business. Let's see if we can progress a little farther here.

The Complaint in this case alleges, to state it very succinctly and to state the main purpose and charge, the others which I may go into a little further, but basically this Complaint charges that the acoustical tile contractors, operating in this manner, after my clients had received their first carload of Flintkote tile, conspired with and obtained Flintkote's agreement to aid them in this scheme, and to eliminate the competition, with this scheme, of my clients, by having Flintkote agree with them they would refuse to sell my clients any more tile.

Now, let's go to the evidence relating to—and I might add there that the evidence should show why Flintkote did [9] this. The Complaint alleges they did it for the purpose of perpetrating this monopoly among the acoustical tile contractors and the general system of distribution here.

I don't expect Mr. Black to be in this Court and admit that. But the evidence is going to be evaluated by you.

Some of that evidence will be this: It will show Mr. Waldron here has been in the acoustical tile business in one form or another for about 17 years. I don't think he looks that old, either, but he has.

During a part of that time he was an applicator.

In other words, he actually put it on the ceilings and walls.

Subsequently he became one of the best acoustical tile salesmen in the area. He worked for, I believe, Shugart Company. He worked for Coast. At the time he tried to go into business for himself he was working for the R. W. Downer Company.

During that period with the Downer Company, at least, Mr. Waldron was making in excess of a thousand dollars a month in commissions. And his duties were simply that he was not an employee, that he worked on a straight commission basis, without regard to time clock or anything else.

He was a free-lancer with his efforts going to the Downer Company, and the same thing had been true with the Shugart Company. And that is the general relationship of an acoustical tile salesman here to any particular company. [10]

The evidence will show further, with respect to Mr. Waldron, that during this long period of association, work in the acoustical tile field, he, like other salesmen, had built up many contacts with general contractors to whom they sold their product. And to make it clear, the evidence will show that the only way these acoustical tile contractors operate is to keep track of the Greene Sheet, which is a publication here announcing future bids by general contractors, asking for subcontracts like acoustical tile, perhaps plumbing, wiring, and so on.

Then the subcontractor, the acoustical contractor submits a bid, ordinarily, and that is the way he gets his work. It is the salesman, however, who

computes the bid and it is a sales job. I mean he tries to get lower than his competitors and still get the job and make money for the company, because if the company doesn't make money he doesn't make money, and I think the evidence will further show if he turns in a job, a bid that loses the company money, at least so far as Mr. Waldron, Mr. Lysfjord are concerned, they had to make up their share of the loss.

Now, Mr. Lysfjord hasn't been in this business quite as long as Mr. Waldron, but he has been in it for ten years and his experience practically parallels that of Mr. Waldron.

He, likewise, at the time they both attempted to go into business, was one of the top salesmen for Downer Company. [11] He made a salary comparable or he made commissions comparable to that of Mr. Waldron. And he likewise had built up many contacts with general contractors throughout this area. Some of their names will be mentioned to you. There was Jackson Bros., for instance, who built perhaps half the chain markets around here, including other large types of buildings.

There was Hagen-Lee, who built an entire industrial suburb out near Inglewood. That is just an example of the type of their activity.

I think Mr. Charles Lee in the firm likewise is the architect and perhaps builder for many of our newer theatres in the area.

Mr. Lysfjord and Mr. Waldron for many years prior to 1951, when Flintkote accepted them as dealers, had desired to go into the acoustical tile con-

tracting business, but being experts in the field, they had been—I mean even though they were experts in the field with a following, they were unable to get a manufacturer's line.

The accredited tile that was sold here was sold, as I have told you before—the only way they could get it was to get somebody to add them to their list. That they did with Flintkote.

In any event, the evidence will show that they did make efforts, they had thought about it for years, and the beginning of the connections with Flintkote comes out of their [12] experience in this field, too.

There is a man named Robert Ragland, who at that time was an employee or a promotion man, or some such position in Flintkote, in the acoustical tile field.

Robert Ragland had worked with both of these men, I believe, at the Shugart Company. He knew them. He was personally friendly with them.

When Robert Ragland quit his job with Shugart and went to work for Flintkote these plaintiffs felt they had a friend there, someone who could get them in.

And the conversations, preliminary conversations were between Mr. Lysfjord and Robert Ragland. I don't believe that Mr. Waldron had many of these, engaged in many of these preliminary conversations. They started perhaps as early as June, 1951, and they consisted principally of Lysfjord asking Ragland to help him get Flintkote to give them an accredited regular line of supply.

After numerous conversations and so on, I think the evidence will show that Ragland knew they were good men. He felt that Flintkote ought to have them on their team, and after so many of these conversations—Mr. Waldron was brought into them, too.

The first conversation, where other officials of Flintkote participated, was out at a restaurant on Western Avenue, I believe, called the Manhattan Club. During a [13] luncheon engagement there Mr. Lysfjord, Mr. Ragland and Mr. Ragland's immediate superior, Mr. Baymiller, attended. And at this meeting the plaintiff Lysfjord and these three people went over Lysfjord's background and Waldron's background, their financial status, their ability to bring in trade to Flintkote, and so on.

Now, I don't know whether it was at that meeting or a subsequent meeting that either Mr. Baymiller or Mr. Ragland brought out the fact that they weren't adequately represented over in Riverside and San Bernardino Counties. And the plaintiffs' evidence will show these plaintiffs did agree that if they were made regular dealers of the Flintkote, they would attempt to cover that area, too.

About a week after this meeting I am talking about, and that must have been sometime the latter part of November of 1951, but, in any event, a few days thereafter there was another meeting at the same place.

This meeting was attended by the same three people, that is, Ragland, Baymiller, Lysfjord, and also

by Waldron and Thompson, a superior of Baymiller at Flintkote, so you had five people there.

At this meeting much the same conversation took place. The whole background of the plaintiffs was reviewed for Mr. Thompson's benefit. Their financial status was gone into.

At that meeting also Mr. Thompson wanted to know if they would cover both areas, and my clients said yes. [14]

The meeting lasted some minutes, during the luncheon hour at least, and it was arranged that my clients, Mr. Lysfjord and Mr. Waldron, would meet those three people at the offices of Flintkote and they were assured at this meeting quite emphatically that they had an excellent chance of getting the line of tile.

So about a week after that the plaintiffs did attend this meeting at Flintkote's offices. They were met by Mr. Ragland, Baymiller and Thompson, and at this time they had brought a financial statement with them, and I believe that financial statement will show assets of somewhere around $50,000 and the details of those assets.

When they came in the door and were met by these three gentlemen, they were told they were in. They were introduced to Mr. McAdow. Mr. McAdow is the credit manager there. And I believe they left this financial statement with him.

Then they were taken again to what I think was the top man at Flintkote, a man named Mr. Harkins, and either Mr. Baymiller or Mr. Thompson or Mr. Ragland took them in there, introduced them

as their new account, and left them there to talk with Mr. Harkins.

At this conversation Mr. Harkins congratulated them. He told them that Flintkote was constantly improving their tile, there should be many years of amicable relationship, [15] and the usual congratulatory language that the big boss would give somebody starting a business for the first time.

At this meeting I believe also Mr. Harkins told these gentlemen, these plaintiffs, about a large roofing order. Flintkote handles more than just acoustical tile, they are big dealers in roofing material and other matters. And Mr. Harkins took the trouble to tell these plaintiffs about a roofing project that Flintkote Company had either sold or was going to sell, and I believe if I recall correctly it was the Ryan Aircraft Building somewhere out near Pomona.

He suggested that these plaintiffs sharpen their pencils and go after the acoustical tile in that building.

That is about what happened. The two plaintiffs went away, and at that time they were acoustical tile dealers for the Flintkote line. They had no other line. They didn't try to get another line because Flintkote is a complete line in itself and it qualifies.

Within a very few days thereafter—and I forgot one other thing on that last meeting at the Manhattan Club—at that meeting I believe there were ideas brought to the attention of these Flintkote officials concerning stationery, and these matters, while seemingly trivial at the time, I am sure will

have significance when you hear the evidence in the case.

At any rate, at this meeting the question of stationery was called to their attention, and I believe Mr. Lysfjord or [16] Mr. Waldron had an idea of advertising on each letterhead. In other words, they listed their products down the margin and so on like that. The Flintkote people thought it was a good idea.

So after this Harkins meeting, Mr. Lysfjord inquired of Mr. Ragland about using a Flintkote cut on their stationery. They were very happy to supply it.

The first cut furnished by Flintkote was too large. Subsequently another cut was sent to the Atlantic Avenue address, that I am going to speak of in a minute, by Mr. Ragland or somebody at Flintkote. That cut was used on the first stationery printed by the aabeta company, which is the name, you will recall, of the plaintiffs' company.

On that stationery was printed a San Bernardino address, a Los Angeles address, the products I believe, and it is quite a fancy piece of stationery which will be shown to you. The calling cards had the same data on them.

I believe that somewhere around the 1st of December, or right around the 1st of December, Mr. Waldron, who terminated his relationship with the Downer Company, I believe, on December 31st, commenced organizing the aabeta company. He looked for a lease, he looked for building requirements, which was warehousing principally.

He found a small warehouse after some difficulty out on Atlantic Avenue, I think it was 7300 or some such number [17] Atlantic Avenue. It was about 1000 square feet.

He also somewhere in January began looking for a place in San Bernardino to cover that end of the territory.

Mr. Lysfjord at that time was still on the payroll or still working for Downer & Company in the manner I have described. He agreed to stay with that company until the end of January, and I believe he did so, but as I told you it wasn't a time-clock job so he likewise was active at the same time in setting up his own company.

Up to December 11 I believe they had made certain contacts in San Bernardino, they had no office or warehouse space, and in Los Angeles I believe they did have this Atlantic Avenue warehouse and were occupying it. They made arrangements for stationery but as yet they had ordered no tile.

On December 11, 1951, just a few weeks after this last meeting at Flintkote when they were accepted as dealers, Mr. Ragland came out to the Atlantic Avenue address and told these gentlemen that the Hilo plant was going to be closed down for repairs and for them to get an order in fast so they wouldn't be caught without tile when they were ready for it.

I think that meeting came about by Ragland calling Mr. Waldron at San Bernardino; he was over there trying to get connections. He called Mr. Lysfjord at the Downer Company I believe and

they agreed to meet at this Atlantic Avenue [18] warehouse. They did.

On the way in or after he got there, Mr. Lysfjord bought an order pad. They hadn't even got their regular stationery yet. On that order pad the original order for Flintkote tile was placed.

Ragland took it back to the office and it was delivered along about January 4 of 1952.

Now there are a few significant things in connection with that purchase. A carload of acoustical tile I believe is something like 60,000 square feet. It could even be 6000 square feet, but I am not an expert in that yet.

What is a full carload?

Mr. Waldron: 60,000.

Mr. Ackerson: 60,000 square feet more or less.

The little 1000-foot warehouse on Atlantic wouldn't hold a carload. Mr. Waldron was associated with the California Decorating Company in San Bernardino. He was an honorary officer for doing decorative work for them or giving them decorative ideas at times, is the way I understand it, but he felt, since you had to have a place to send this tile at the time you ordered it, he gave Ragland the address of the California Decorating Company for delivery of that tile, and it was actually delivered there, and the invoices of Flintkote will so show.

Now we get on to the delivery date of this tile the [19] first part of January. In between then and December 11th the telephones had been connected or ordered for the Bell address on Atlan-

tic Avenue. Arrangements had been made to publish a fictitious name under which you do business. I don't know whether you all understand that, but we have a law that gives certain advantages and certain disadvantages if you use a name like aabeta company without publishing it and showing who the owners are.

Either Mr. Waldron or Mr. Lysfjord had made arrangements for the publication of a fictitious name in Los Angeles County here, and in San Bernardino County. They had arranged for things like trucking, stationery, they had contacted people and I think there had even been a few bids made in this area.

That brings us up to another point I think that I forgot in that last meeting at the Manhattan Club. That was an important meeting. At that meeting Mr. Waldron expressly asked Mr. Thompson a question, whether or not Flintkote could be influenced by any objections from existing acoustical tile contractors, and he warned Mr. Thompson that there would be objection when they found out that these plaintiffs were in business.

Mr. Thompson assured them that Flintkote was big enough to take care of itself.

Now we have these people in the Atlantic Avenue address, and I think somewhere around January 1st or 2nd they did succeed in getting a larger place in San Bernardino. [20-21]

When this deal was delivered to California Decorating Company it was diverted to the address on Waterman Avenue, I believe it was, over there,

which was the warehouse these plaintiffs had acquired by that time.

Things went on in the usual manner then. They were sort of in business. Mr. Waldron worked very hard over in the San Bernardino area getting connections with contractors. He was unacquainted over there.

I think Mr. Ragland gave him some contractors, the names of some contractors with which he wasn't acquainted here. And he gave him a list of contractors put out by The Flintkote Company, a mimeographed list of contractors in San Bernardino-Riverside Counties, Palm Springs, and so on.

Mr. Waldron was over there busy making those contacts, establishing a bank account, telephone listings, and so on.

At the same time the same things were a little farther advanced here. I believe they were even submitting bids here. Then we rock along, shall we say, until this magical date somewhere around February 19th or 20th; I think we could place that date. On that date Mr. Lysfjord had severed his connections with the Downer Company and was devoting full time here.

Mr. Waldron, of course, had been devoting his full time to aabeta co. since January 1st, at least.

On that date, Mr. Waldron was again contacted in San [22] Bernardino and told to come up for a meeting. Mr. Lysfjord was contacted likewise. The meeting was held at the Atlantic address of the aabeta co.

At that meeting the Flintkote representatives in-

volved were the same three, Ragland, Baymiller and Thompson. There was no written communication in connection with this meeting at all. They called up and asked for an appointment.

Mr. Waldron came in a little late. Nothing was much said until he got there. When he got there it was announced Flintkote would no longer sell them tile.

When pressed for a reason, they stated, "Well, there are objections to you doing business around Los Angeles."

Mr. Waldron said, "The pressure really must be great."

Baymiller said, "We had pressure all right, but it is out of our hands. We are following orders. That is all."

That is the last tile they got. There was never an official notification, I mean in the ordinary sense of giving a reason in writing or even a written firing. There is no document on that.

Now, that notification that there would be no more tile from Flintkote, the first thing the plaintiffs did, of course, was that they were stuck on a year's lease at the San Bernardino warehouse. They had no further use for it. They had no tile to sell. They immediately went over and notified the contractors that they had contacted there of [23] what had happened, and told them and thanked them, and said, "But we can't submit the bids we have promised." They cancelled out telephone connections, bank account, and all of the results of the work of Mr. Waldron in the prior month or so.

They really had no use for this Los Angeles warehouse as acoustical tile arrangements, so far as they were concerned, but they did have these bids they had made to use up the first carload of tile.

And you must understand that you don't bid today and start installing it tomorrow. Sometimes there is a lag of two or three months. You get the bid and it will be ready to put in when the general contractor gets around to.

So during the first six months of 1952 they had most of that carload of tile installed. And in the meantime, in order to keep their skeleton crew together, to keep this one office running, they resorted to installation of hard wall plastering. I think it is a substitute for regular three-coat plastering.

They had gone into bidding on jobs that required carpentry work and almost anything else for which they were not fitted, in order to keep going. And they have managed to keep going until today. But they have had to resort to one other tactic to keep going until today, and that is buying tile from their competitors at enhanced prices or buying it from lumber yard dealers at enhanced prices. [24]

The tile they have purchased since their contact with Flintkote was broken, they have had to pay from 17 to 25 per cent markup on it to get it, and then turn around and try and compete with the competitors who are paying that much less. That was another disadvantage in being cut off from Flintkote.

It is impossible and it has been impossible for these plaintiffs to bid on any sizable job. In other

words, they couldn't utilize their contacts with Hagen-Lee, Jackson Bros., and all these contractors, that they had been used to doing business with and depending on because they couldn't guarantee to have the tile when the job was ready. And that, of course, is in addition to it.

So they have been restricted more or less to high-priced tile on small private jobs or small jobs where they had, they would personally do it, and where they could charge the price and come out even on it, at least.

There are other elements of damage which will be reverted to in the course of the testimony, but I want to give you just a general idea of what the plaintiffs think this case is about.

Now, I will finish this opening statement by merely again stating to you ladies and gentlemen of the jury that I have been talking to you from memory. It is my memory of the evidence. It may vary slightly. It may vary in many [25] spots from the actual evidence.

Of course, my speech again is not to be considered by you ladies and gentlemen of the jury as evidence in any way. I thank you.

Mr. Black: If the Court please, Mr. Ackerson, ladies and gentlemen of the jury, when it comes time for the defendant to make an opening statement it is customary to do that either at the conclusion of the plaintiffs' case or at the conclusion of the plaintiffs' statement at the beginning of the plaintiffs' case.

In a case that is apt to be a long trial, such as this, it is customary for the defense to reserve its opening statement until the opening of the defendants' case, because otherwise so much testimony has been introduced by the plaintiffs' side that it is not quite reasonable to suppose that the people on the jury will remember the defendants' version of the case that far back.

It is not permissible to split the opening statement in any detail. In this instance, however, the Court and counsel have very graciously consented to allow me just very briefly to state, without attempting in any way to review what our evidence will show, the points of difference between us, so that you may have a conception of some of the basic issues that are disputed in the case.

I shall do that in just a very few moments, because I do [26] not intend at this time, as I have said, to review the evidence we propose to put on when it comes our time to introduce witnesses.

Most of what Mr. Ackerson has said about the industry generally, the nature of the product, the number of people engaged in industry are not in dispute.

The basic issue between us is whether there was any unlawful conspiracy or combination in restraint of trade. As to whether any such conspiracy existed between the acoustical tile contractors, this defendant has no knowledge or information.

It emphatically denies it ever participated in any such combination or if any such combination existed,

that it had any knowledge whatever of its existence.

The position of this defendant in this case is that it made this arrangement with the plaintiffs in this case to take on a line of acoustical tile in the San Bernardino and Riverside area under the expressed understanding that that area was the only area in which there was sufficient room to operate. That the Los Angeles metropolitan area was already adequately taken care of by the existing distributors of the Flintkote product.

It was on that distinct understanding these arrangements were made. They were in the form of a loose, informal understanding. There was no definite contract as to quantities, [27] as to term or duration. It was an arrangement which obviously was terminable at the pleasure of either side.

Later, after the arrangement started, it is the position of the defendant Flintkote Company it came to its knowledge and information that contrary to this expressed understanding the plaintiffs were actively operating in the Los Angeles metropolitan area.

After discussing the matter in the Flintkote circles, it was decided that in that situation there was nothing to do but to terminate this relationship. That was thereupon done, and that was the reason why it was done, solely as a matter of the business judgment and policy of The Flintkote Company.

It is not denied there were complaints made by the other Flintkote dealers in the area, that these people, without any prior notice to them, were com-

ing into this area and competing on the same line of tile.

But it is the position of this defendant that it acted in that connection on its own responsibility and as a matter of its own business judgment, that in no way at any time that it participated in any unlawful conspiracy or combination. That is in general the basic issue between us in this lawsuit.

Thank you very much.

The Court: Now, members of the jury, it might be helpful [28] to you to hear the portion of the statute which is involved in the case, because it would be very simple, in light of the alleged facts, for you to be noting evidence as it comes in, in the light of a theory that this is a breach of contract suit. It isn't a breach of contract suit at all. It is a suit under the antitrust laws.

The portions of the antitrust laws which relate to it are very simple. We start out with the basic laws. The Court will read you all that I feel pertains to the case at the close of the case. But just at the start we will go back to what would be parallel to the Ten Commandments, that is, to the basic law with respect to antitrust actions.

There is a statute known as the Sherman Act, which probably all of you have heard of, even though you have all said you do not have any particular acquaintance with antitrust laws. The Sherman Act is one of the basic antitrust laws. The Clayton Act is another. I think it will suffice to read you a portion of the Sherman Act. That Act provides:

"Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal * * *

"Every person who shall monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states * * *."

is doing an illegal act. [29]

Reading further:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover * * * the damages by him sustained * * *"

So this suit is not a contract action, nor is it a criminal action in which the Government is seeking to obtain punishment or legal redressment against some concern alleged to have violated the antitrust laws. It is a case in which these two plaintiffs claim that they have suffered damage as a result of acts which come within the general character of the acts prohibited by the portions of the Sherman Act which the Court has just read to you.

For the present, this being the beginning of the trial and not the instructions, was the statement of the Court and its reading of the Act sufficient or should it be amended or supplemented?

Mr. Ackerson: I think it was sufficient, Your Honor.

Mr. Black: I don't believe it requires amplification, Your Honor, at this time.

The Court: Thank you. We will take our morning recess. [30]

(Short recess.)

The Court: The jury and the alternates are present, and counsel are here.

May it be understood that the jury and alternates are always present unless someone calls our attention to the fact that there is an absence?

Mr. Black: So stipulated.

Mr. Ackerson: So stipulated.

The Court: Thank you.

Proceed with the case.

Mr. Ackerson: I will call Mr. Waldron.

Mr. Black: Mr. Waldron, before you start to testify, may I ask you to remember that I am a long distance away from you, it is a big courtroom and I would like to hear everything you say.

Mr. Waldron: I will do my best, Mr. Black.

Mr. Black: Thank you, sir.

WALTER R. WALDRON

called as a witness by and in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Walter R. Waldron.

The Court: Mr. Waldron, I didn't really mean

(Testimony of Walter R. Waldron.)

to cast reflections on this tile. It is probably very good, but [31] somehow either the design of the room or the size of the room makes it very difficult for people to be heard when they speak in ordinary conversational tones, and when some are removed quite a few feet from the others. You are inclined to be a soft-spoken gentleman. Just forget that characteristic while you are testifying.

The Witness: I am sure I will forget occasionally, but if you will point at me I will try to raise my voice.

The Court: Any jurors or counsel or the parties who do not hear either this witness or any other witness or the Court at any time—I tend to drop my voice, too—just speak up and we will try to correct it.

Proceed.

Direct Examination

By Mr. Ackerson:

Q. You are Walter R. Waldron, one of the plaintiffs in this case? A. Yes, sir.

Q. Mr. Waldron, how long have you been associated with the acoustical tile business?

A. Since the spring of '34, 1934.

Q. What were you doing at that time?

A. Application.

Q. By "application" you mean actually putting it in the buildings? [32] A. Installing.

Q. Installing it? A. Yes.

(Testimony of Walter R. Waldron.)

Q. And how long did you continue to do that type of work?

A. Until about 1946 or '47.

Q. And theerafter you did what?

A. Sales work.

Q. Who did you first start selling acoustical tile for?

A. A firm by the name of Allied Construction Industries, that didn't remain in business very long.

Q. And how long were you with them?

A. Only a few months.

Q. Then where did you go?

A. To Coast Insulating Products.

Q. And that would be when, about the same year, '46? A. I think that was in early '48.

Q. And did you perform the position of salesman for Coast? A. Yes.

Q. How long did you remain with them?

A. Until the latter part of 1950, somewhere in September, 1950.

Q. And where did you operate as salesman for Coast? [33] A. Here in Los Angeles.

Q. What did you do after you left Coast?

A. I went with the R. W. Downer Company, the same type of business.

Q. And did you remain with the R. W. Downer Company until you quit to go into business for yourself? A. Yes.

Q. And you were a salesman at the R. W. Downer Company? A. That is right.

(Testimony of Walter R. Waldron.)

Q. Then I take it you never did work for the Shugart Company?

A. My first experience was with the Shugart Company from 1934 to 1946 or '7.

Q. That was as an applicator? A. Yes.

Q. Now, Mr. Waldron, I used the term "AMA," or American Materials Association. Will you explain what that term means?

A. Acoustical Materials Association.

Q. Acoustical Materials Association?

A. Yes.

Q. What is the significance of that organization? Just tell us what it is and what it does.

A. Yes. It was set up to have materials tested for their rating and noise reduction, and they use one testing [34] firm—I can't recall the name of it at the moment—but all these people submit samples to this one firm and they are tested and given a rating, and we refer to it as the AMA rating. They publish a yearly results on that. [35]

Q. And in your experience as a salesman, have you run across this AMA rating in the sale of tile?

A. Oh, yes. You mean do I find requests for it?

Q. Yes. Do you find requests or what effect does this AMA rating have in your work as a salesman?

A. Well, the architects request tile equal to AMA rating in their acoustical installations.

Q. In other words, the architects put that in their architectural plans to the general contractors?

A. That is in the specifications written up by the architect.

(Testimony of Walter R. Waldron.)

Q. Is that the general practice, to your knowledge, or is that occasionally, or what?

A. No, it is very constant. They all want that rating. They want to be sure of it.

Q. Have you ever tried to sell a tile that did not have an AMA rating in a public bid job or a job that just had an architect work on it?

A. I have submitted material to try and get approved, but it didn't have the AMA listing, so they wouldn't let us bid the material, without an AMA rating.

Q. You say that is the general practice?

A. Yes.

Q. Now, Mr. Waldron, at the time you and Mr. Lysfjord went into business together, if you know, who were the then present [36] dealers or contractors using Flintkote tile?

A. That was R. E. Howard Company and Sound Control Company, Coast Insulating Products.

Q. Now, do you know whether or not Howard Company also handled another brand of tile?

A. Yes, they handled U. S. Gypsum products.

Q. Is that a tile comparable to Flintkote?

A. Yes, it has an AMA rating.

Q. What about Sound Control, did they handle another type of tile?

A. Yes, they handled National Gyp.

Q. Does that tile likewise have an AMA rating?

A. Yes.

The Court: Now, Mr. Witness, you are tending

(Testimony of Walter R. Waldron.)

to use terms that are familiar to the trade, "National Gyp."

The jurors aren't in that trade.

The Witness: I am sorry.

The Court: Let's take a little more time and be a little more explicit.

Q. (By Mr. Ackerson): In other words, when you used the term "U. S. Gyp." you mean U. S. Gypsum Tile?

A. I think they call it United States Gypsum Company that produces an acoustical tile, among other things.

Q. The same thing with "National Gyp," you meant National Gypsum Company? [37]

A. Yes.

Q. You mentioned one other, Coast Insulating Products, as being a Flintkote dealer at that time. Did they likewise handle another tile?

A. Yes, they had Simpson Logging Company products. Simpson Logging Company makes an acoustical tile and it has an AMA rating.

Q. What other brands of tile were sold in this area which likewise had an AMA rating?

A. Armstrong Company's acoustical tile.

Q. Who dealt in Armstrong tile, what contractor?

A. R. W. Downer and L. D. Reeder Company at that time, and Denton Company, too, I believe.

Q. Three. They had three Armstrong dealers at that time then?

A. That is my knowledge.

(Testimony of Walter R. Waldron.)

Q. Do you know whether or not either of those three companies handled an additional brand of AMA tile?

A. R. W. Downer Company had on their stationery Fir-Tex products, but in my experience we used very little of it; with them, I mean.

Q. Who handled Fir-Tex, was that also an AMA tile? A. Yes, it is.

Q. Was it sold in this area? A. Yes. [38]

Q. To whom was it sold?

A. I believe Acoustics, Inc., handled that, among others, at that time.

Q. What are the names of other acoustical tiles? Are there any other brands?

A. The Celotex products, and the Johns-Manville products. And I believe that covers it. I believe we covered those with the contractors I mentioned.

Q. Who handles Celotex?

A. That is the Harold E. Shugart Company.

Q. Who handles Johns-Manville?

A. Johns-Manville have their own outlet. They handle it themselves.

Q. Are they both AMA approved tile?

A. Yes.

Q. Is that right, approved, or is it rated?

A. I imagine rating or approved, either one, would be correct there.

Q. Now, Mr. Waldron, I would like to call your attention, if I may, to your contacts with Flintkote Company, in any effort you personally made or par-

(Testimony of Walter R. Waldron.)

ticipated in, looking toward getting the supply of their tile for you and Mr. Lysfjord.

You recall when and where you first conversed with any representative of Flintkote Company on that subject?

A. I believe that was at the meeting with three of [39] their people and my associate and I.

Q. Do you recall where that occurred?

A. Yes, I think that was the—that was the Manhattan Supper Club; lunch.

Q. When was that, approximately?

A. That was early in November of '51.

Q. Had you attended any prior meetings to that time? A. Well——

Q. I believe you stated that was the first one.

A. I think Elmer and I and Bob Ragland were together on one or two occasions; that was rather early there. I don't know the time. But Mr. Lysfjord was working with that more vigorously than I, during the early stages.

Q. Yes. Now, can you tell us, in your own words, what transpired at this Manhattan Supper Club meeting?

A. That meeting was for the purpose of establishing us as a Flintkote dealer, contractor, and we were assured at that time that we would become a Flintkote dealer.

Mr. Black: That is objected to, if the Court please. That is a conclusion of the witness.

The Court: The answer is stricken. I think the question was proper but, Mr. Witness, just for your

(Testimony of Walter R. Waldron.)

information, because you are not used to being a witness, witnesses can tell what was said but they can't tell the result or conclusion of what was said. That is, you said you were assured. [40]

The Witness: I see.

The Court: Now, that is your idea of it. Perhaps when the jury hears what was said, they might think you were assured, and they might think it was simply a maybe or they might think it was a no.

So you tell us conversations. While we hope this trial isn't going to last a great length of time, we are not in a rush. You take whatever time that is necessary to give us these conversations, and think what you are going to say before you say it. [41]

Q. (By Mr. Ackerson): I think you had better state who attended again and then just state the best you can the substance of what each party said.

A. The people that were there were Mr. Ragland, Mr. Baymiller and Mr. Thompson, and Lysfjord and myself.

As near as I can remember, they discussed our background and had us present volume of work that we had been doing in the Los Angeles area, and wondered if we could continue to do that and hold that volume and hold the people that we were working with at the time.

Q. Who inquired about that?

A. Mr. Thompson talked and led the conversation.

Q. Did you say anything further?

A. Yes. I told him I was sure we could hold the

(Testimony of Walter R. Waldron.)

volume that we had been doing and could probably do better.

Q. How did you apprise him, if you did, of the volume you had been doing?

A. I didn't get the question.

Q. How did you notify him or tell him of the volume which you had been accustomed to doing?

A. We had with us some contracts covering certain volume, quite large volume of work at that time, and they looked them over and the people that we were doing business with, that these contracts was from, and they covered something [42] like $40,000 or $50,000 worth of work that was signed up that last month. And they thought if we could continue with those people with that sort of business among others why that would be to their delight.

Q. Now you still can't get over this habit of saying "they thought." Did they say that?

A. Yes, they wanted us to go ahead like that.

Q. Was any other subject discussed by either of you there at that time?

A. Yes, they wanted us to bring a financial statement in.

Q. Who requested that?

A. Mr. Baymiller—no, I believe Mr. Thompson did.

Q. Anything else said?

A. Yes. They wanted us to cover the eastern part of the town and state along with our Los Angeles ac-

(Testimony of Walter R. Waldron.)

tivities as soon as we could do so. They weren't getting adequate coverage in that area, they thought.

Q. What did you say, if anything?

A. We told them that we would do so, after we got established and we could handle it, we would do so.

Q. Do you recall anything else in connection with that conversation?

A. We brought up the fact that they would cause a lot of ill feelings among the general acoustical contractors [43] in the city as soon as they learned that we were in business.

Q. Who brought that up? A. I did.

Q. What did you say?

A. I told them that they were organized here and they didn't plan to have or would be very unhappy if they had a competing contractor in the field because they weren't competing with each other any more.

Q. Did anyone make any other comment on that? Did you get a reply?

A. Mr. Thompson assured us that no amount of pressure would intimidate The Flintkote Company, that they were too big for that.

Q. Was there anything said about your handling only Flintkote line of tile?

A. No, at that moment I can't remember of any restrictions put on our activities.

Q. Was there anything said by either Messrs. Baymiller, Ragland or Thompson concerning where

(Testimony of Walter R. Waldron.)

you were to operate other than what you have stated?

A. No. They wanted us to take care of San Bernardino, Riverside, the eastern part of the state, if we could, and we assured them we were pretty sure we could, in addition to the Los Angeles area.

Q. How long would you say this meeting lasted? [44]

A. I would say about an hour. We had lunch there.

Q. How did the meeting break up?

A. In very friendly terms. They told us we could rest assured that we would be their acoustical outlet and that they were happy that they had one outlet that had only one acoustical tile, which was theirs, to sell.

The Court: Now, please, you say "they told us." I don't think they stood up and talked like a Greek chorus. Some one of them told you.

The Witness: I am sorry.

The Court: So let us get away from trying to condense things too much. Get a little more detail in because the jury is going to have to be instructed at the close of the testimony that witnesses can't form conclusions, that they will take the specifics which the witnesses have said and not the generalities. So let us have that question read, and then the witness may answer it again.

(The question referred to was read by the reporter as follows: "Q. How did the meeting break up?"

(Testimony of Walter R. Waldron.)

The Witness: Well, Mr. Thompson was doing most of the talking and I am sure that he would be the one that said that they were happy that they had one firm that just sold their tile alone. [45]

Q. (By Mr. Ackerson): Mr. Thompson or anyone else say anything about a subsequent meeting at this time, about meeting again?

A. Yes, they wanted us to come again.

Q. Don't say "they." Who said it?

A. Mr. Thompson arranged to have another meeting at a later date as soon as we had our financial statement worked out.

Q. And I believe you placed the date of this meeting that you are talking about as somewhere in November?

A. The latter part of November.

Q. When did you next see, if you did see, either of these three gentlemen from Flintkote?

A. In their office in the latter part of November.

Q. About how many days after this meeting that you have related?

A. I think a week or 10 days.

Q. Now, will you state what occurred on that occasion and who attended?

A. Mr. Baymiller and Mr. Ragland and Mr. Thompson were there, Lysfjord and I.

Q. Can you just state what you said, what either or all three of those people said, and what transpired?

A. We were introduced at that time, and we had our financial statement, to Mr. McAdow, their credit

(Testimony of Walter R. Waldron.)

manager, [46] and then—I don't remember the words—we had general conversation outlining the progress of our future, and I believe Mr. Lysfjord had a form of stationery to be worked up, and asked their opinion.

Q. Whose opinion did you ask?

A. Mr. Baymiller and Mr. Ragland.

Q. Then I take it you met, you and Mr. Lysfjord came in, and you said you were introduced—to whom? A. To Mr. McAdow.

Q. And you mentioned a financial statement.

You have seen this, Mr. Black?

Mr. Black: Yes, we have seen that.

Mr. Ackerson: Let me have this marked for identification.

The Clerk: Plaintiffs' Exhibit 1 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 1 for identification.)

Q. (By Mr. Ackerson): Is this the financial statement which you had prepared and submitted at this time or is it the copy of it?

A. Well, that is either it or a copy. I think there were two or three made.

Mr. Ackerson: Now I will offer that at this time if there is no objection.

Mr. Black: I presume it is the same. [47]

Mr. Ackerson: It is the same, Mr. Black.

Mr. Black: No objection.

(Testimony of Walter R. Waldron.)

(The document heretofore marked Plaintiffs' Exhibit No. 1 for identification was received in evidence.)

Mr. Ackerson: I will let the juror pass that around, if you wish.

(The exhibit referred to was passed to the jury.)

Q. (By Mr. Ackerson): Now you were introduced to Mr. McAdow and you handed Mr. McAdow a copy of this Exhibit 1, Plaintiffs' Exhibit 1, did you?

A. Yes. I don't remember if I handed it to him or Mr. Lysfjord.

Q. Then what happened?

A. Well, we were taken by them back to Ragland's desk, and we were sitting there for a few minutes and then they wanted to introduce us to their superior, and one of them took us in to Mr. Harkins' office. [48]

Q. And do you recall which one of them took you in there? A. I don't at the moment.

Q. Would you say it was either Ragland, Baymiller or Thompson?

A. Yes, I would say it was either Ragland or Baymiller.

Q. After you and Mr. Lysfjord got in before Mr. Harkins, will you tell us what was stated?

A. Well, the person that took us in, he didn't stay; he went out. And Mr. Harkins congratulated

(Testimony of Walter R. Waldron.)

us on the joining of his firm and expressed his feeling towards future association and said they would pledge every cooperation their firm could offer in advertising and samples and architectural contacts.

And he also mentioned a job that we might go and look at, that they had the roofing contract on it.

Q. Do you recall what that job was?

A. It was an aircraft company. I don't remember the name, but it was out between Los Angeles and Pomona.

Q. Well, is that all that transpired there then?

A. Yes, so far as I can remember.

Q. All right. What did you do then? You were still with the Downer Company at that time?

A. Yes. [49]

Q. When did you notify the Downer Company you were going to leave?

A. Around December the 15th, that I had planned to leave about the 1st of that next month. And they asked me if I could stay until about the 10th, until they could make some arrangements for replacement, which I did.

Q. Now, in between this last meeting at Flintkote and the time that you left the Downer Company, what, if anything, did you do with respect to setting up your aabeta co.?

A. Well, yes, we arranged for a warehouse on South Atlantic Avenue around the 1st of December.

Q. With whom did you make that arrangement?

A. With a Mr. Spies, the owner.

(Testimony of Walter R. Waldron.)

Q. Was he the owner?

A. Yes. We planned to rent, so we took it. And then later on we decided to keep it for a year and negotitiated a lease.

Q. How long were you in that Atlantic Avenue address prior to the time you signed the lease? Can you give us an idea of that?

A. Yes, about three weeks, I think, or a little better.

Q. Now, I am going to show you this document.

Mr. Ackerson: May I have this marked for identification?

The Clerk: Plaintiffs' Exhibit 2 for identification. [50]

(The document referred to was marked Plaintiffs' Exhibit 2 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 2 for identification. Is this the lease that you executed with Mr. Spies?

A. Yes, I believe that is the exact one.

Mr. Ackerson: I offer it in evidence.

Mr. Black: No objection.

The Court: Received into evidence.

(The document heretofore marked Plaintiffs' Exhibit 2 was received in evidence.)

The Court: Now, counsel, it is the policy of the court when any document is received into evidence it may be immediately passed to the jury; you may

(Testimony of Walter R. Waldron.)

read it to the jury or read part of it to the jury at any time.

Mr. Ackerson: Thank you, your Honor.

The Court: This one is apparently being passed to the jury now.

Q. (By Mr. Ackerson): Mr. Waldron, calling your attention to Exhibit 2, Plaintiffs' Exhibit 2, can you state from looking at that document when it was actually executed, the date upon which it was executed? A. I see a date December 15, 1951.

Q. Can you state that that is the date or the approximate date when you did sign it and execute it? [51] A. I believe it was.

Q. Now, at that time had you made any arrangements in San Bernardino?

A. Not at that time. It was later on, about the first of the year.

Q. Tell us just what you did in that connection.

A. In San Bernardino?

Q. Yes.

A. Since we were short of space here and we were going to open San Bernardino, anyway, I made arrangements out there to use a space, of which I made a lease on about the first of the year.

Q. All right. I am going to show you what purports to be a copy of that lease, Mr. Waldron.

Mr. Ackerson: May I have this marked, your Honor please?

The Clerk: Plaintiffs' Exhibit 3 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked Plaintiffs' Exhibit 3 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 3 for identification, and ask you if that is your signature on there.

A. Yes, that is my signature.

Q. Can you state whether or not that is Rose Vacco's signature?

A. Yes, that is correct. [52]

Q. In other words, you signed that together?

A. Yes, in their place of business.

Mr. Ackerson: I will offer this in evidence.

Mr. Black: No objection.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 3 was received in evidence.)

Q. (By Mr. Ackerson): This lease shows a date of January 2, 1952, between Rose Vacco and Walter R. Waldron for aabeta co.

Now, Mr. Waldron, how soon did you occupy that building in San Bernardino? Were you in it at the time you signed the lease?

A. No; no, we weren't. We had alterations to do. There was no office or anything in it. So later on in the year—or that month we started alterations, to shape up an office, and we received material there sometime in January.

Q. Well now, how long had you been in the

(Testimony of Walter R. Waldron.)

building at the time you received your first carload shipment of Flintkote acoustical tile?

A. I think only a few days.

Q. Now, what, if anything, did you do after this meeting you mentioned with Flintkote, the latter one, in the latter part of November, other than these leases? What did you do in Los Angeles here to get the business going? [53]

A. We had a stationery made up, cards, announcements. We sent out announcements that year of the new business, and personal contacts.

Mr. Ackerson: May I have this marked.

The Clerk: Plaintiffs' Exhibit 4 for identification.

(The document referred to was marked Plaintiffs' Exhibit 4 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I am showing you Plaintiffs' Exhibit 4 for identification, and I direct your attention to a card containing some longhand writing, which I want you to ignore, on the card, and a larger green sheet of stationery, and I ask you merely whether or not that is the stationery which you ordered.

A. Yes, that is the stationery and this is the business cards (indicating).

Mr. Ackerson: Yes. This has to do with another matter, your Honor. I am not going to offer it at this time.

The Court: Has it been marked?

(Testimony of Walter R. Waldron.)

Mr. Ackerson: It has been marked for identification, yes.

The Court: This is a good place to take our noon recess?

Mr. Ackerson: Yes, as well as any.

The Court: We will stand in recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [54]

May 5, 1955—2:00 o'Clock P.M.

Mr. Ackerson: Will you resume the stand, Mr. Waldron?

WALTER R. WALDRON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Waldron, prior to the noon recess we were discussing your activity, some of your activity here and in San Bernardino. That is, you were trying to set up a better company for operation.

Do you recall whether or not your telephone was established in Los Angeles or in San Bernardino first? A. The Los Angeles area.

Q. And you have testified that your warehouse was established here prior to San Bernardino, is

(Testimony of Walter R. Waldron.)

that right? A. That is right.

Q. After you moved into this small warehouse, did you make any efforts to get additional warehousing space in Los Angeles?

A. Yes. Anticipating our activities here and volume we tried about three or four blocks from the address we had at that time, a large sheet metal warehouse that was grouped among some manufacturer's warehouses, and that was one building they [55] didn't use.

However, they had a large fence around the entire project there and they had to close it at about 5:00 o'clock and have a watchman on, so that wouldn't work very well in our activities since oftentimes we worked late.

So we finally did get one over near the Los Angeles River, which was about a half mile or so from our warehouse.

Q. When did you get that second warehouse in Los Angeles with respect to, say, December 1st?

A. I am not sure, but sometime in January or early February.

Q. How long did you keep that latter warehouse?

A. I think about two or three months, or four months, something like that.

Q. Now, Mr. Waldron, as an acoustical salesman, I stated in the opening statement that a carload of tile was about 60,000 square feet. Can you give me some idea as to just how large an order that is, I mean, what does an average size job consume in acoustical tile?

(Testimony of Walter R. Waldron.)

A. Well, first a careload of material is based on units, one-half inch units of thickness, although you may buy one-half inch thick material that would require about 60,000 square feet to fill a car, and if you bought larger thicknesses why the multiple thereof would determine 60,000 units of one-half inch units. [56]

So you wouldn't necessarily have 60,000 square feet of tile in one car, but you would have 60,000 units.

Q. Well, let us assume that it was—do you recall what type of units or what type of thickness you ordered in your first order of tile from Flintkote?

A. Yes, the first order, not having any particular place to put it on jobs, it was about 90 per cent or better of one-half inch units and a small amount of three-quarter inch units.

Q. Now in your operations with the Downer Company prior to that time how long would you expect that amount of tile to last in order to fill the orders that you were taking for Downer & Company? Would it fill one order, two orders, would it suffice for a month of operation, or what?

A. It could fill one order or it could fill probably a half a dozen orders, depending on the size. But there are jobs that take that amount and even greater on one job. [57]

Q. Now, Mr. Waldron, I have previously called your attention to Exhibit 1 in evidence, Plaintiffs' Exhibit 1 in evidence, and I call your attention to

(Testimony of Walter R. Waldron.)

the fact that this may be an exact copy or it may be the copy you submitted to Flintkote Company.

You notice that the address of aabeta co. on this financial statement, which you submitted to Mr. McAdow, I believe, bears an address aabeta co., Los Angeles, California.

A. That is right. If this isn't the exact copy, it is an exact facsimile of the copy.

Q. In other words, if this is not the identical financial statement submitted to Flintkote it is an exact copy? A. That is right.

Q. Now, do you have any idea in your own mind, Mr. Waldron, as to when the telephone was connected in Los Angeles?

A. Yes, right around the first week in January.

Mr. Ackerson: Mr. Black, I have a few bills here from the Telephone Company. Do you think we could stipulate it was within the first week?

Mr. Black: That is my understanding of the facts.

Mr. Ackerson: I won't bother to introduce these. It shows before the 10th, all of these bills. I think it was probably three or four days before that.

Mr. Black: Of 1952? [58]

Mr. Ackerson: Of 1952. So if we can stipulate to that I won't bother to clutter the record with additional exhibits on that point.

Mr. Black: It is my understanding that is the record of the Telephone Company, Mr. Ackerson. After the 4th of January.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: When it was installed.

Mr. Black: Yes.

Mr. Ackerson: Thank you.

Q. (By Mr. Ackerson): Mr. Waldron, did you, in setting up aabeta co., publish a fictitious name, the aabeta co., as a fictitious name company?

A. Yes, I did.

Q. What did you do in that respect?

A. We went to a local legal paper they call it, that handles that advertising and made application, and gave them the data they wanted, and went before a notary public to have it signed or whatever notary publics are supposed to do.

And then they in turn published it for about 30 days or 60 days. I forget; it is quite some long time.

Q. And do you recall, Mr. Waldron, whether that was—did you also publish a fictitious name——

A. Oh, yes.

Q. ——in San Bernardino?

A. I am sorry. Yes, we did. [59]

Q. Do you recall which publication was first or which application was made first?

A. As near as I can remember, the Los Angeles one was first.

Mr. Ackerson: May I have this marked for identification as Plaintiffs' next in order.

The Clerk: Plaintiffs' 5 for identification.

(The document referred to was marked Plaintiffs' Exhibit 5 for identification.)

(Testimony of Walter R. Waldron.)

Mr. Black: Which is No. 5?

Mr. Ackerson: That is the Certificate. And this as Plaintiffs' for identification next in order, which relates to the Los Angeles publication.

The Clerk: Plaintiffs' 6 for identification.

(The document referred to was marked Plaintiffs' Exhibit 6 for identification.)

Mr. Ackerson: The next exhibit for identification relates to the San Bernardino publication.

The Clerk: Plaintiffs' 7 for identification.

(The document referred to was marked Plaintiffs' Exhibit 7 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiff's Exhibit 5 for identification and ask you if that is the certificate of business for a fictitious firm name that you received as a result of your activities at the Los Angeles address? [60]

A. Yes, that is the one.

Q. Do you observe the date of that?

A. 11th day of January, '52.

Mr. Ackerson: Thank you. I will offer that in evidence as Plaintiffs' Exhibit 5 in evidence.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 5 was received in evidence.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 6 for identification, and ask you if you received that as a result of your

(Testimony of Walter R. Waldron.)

efforts in publishing a fictitious name in the Los Angeles area.

A. We published two—yes, this is the one; Los Angeles, yes.

Q. And this purports to be the affidavit of the publisher to the effect that it had been published?

A. That is right.

Q. Do you note, Mr. Waldron, that the publication dates were January 17, 24, and 31, and February 7th of '52?

A. Yes. Those are the dates they had it running in their paper.

Q. Yes. Of course, prior to that time you made the application and the arrangements, did you not?

A. Yes. [61]

Q. Now, I show you a similar document marked Plaintiffs' Exhibit for identification No. 6, and ask you if that is the same type of document which you received as a result of your application for publication of aabeta co. in San Bernardino County? A. Yes, I received that.

Q. And you note that the publishing dates are January 16, 23, 30, and February 6th?

A. Yes.

Mr. Ackerson: I will offer Plaintiffs' Exhibit 6 for identification in evidence.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 6 was received in evidence.)

(Testimony of Walter R. Waldron.)

Mr. Ackerson: And Plaintiffs' Exhibit 7 for identification in evidence.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 7 was received in evidence.) [62]

Q. (By Mr. Ackerson): Now, Mr. Waldron, do you remember receiving an invoice for the cost of your printing of your original stationery for the aabeta company?

A. Yes, we received such an invoice.

Q. Do you remember about when you received that invoice?

A. No. As far as dates, I think it is probably the latter part of January.

Q. Did you ever make a separate or any additional purchase for stationery or calling cards in connection with your San Bernardino operations?

A. No. They were all one and they in turn had both addresses on them and our telephone numbers.

Mr. Black: That is objected to as not the best evidence.

Mr. Ackerson: I have had him identify that stationery in Plaintiffs' Exhibit 4 for identification.

Mr. Black: I wasn't sure that he was talking about that.

Mr. Ackerson: Let me ask him.

The Court: He has not stated the purported contents of names, and so forth, so I do not think that we have got into a situation which needs correction as yet.

Mr. Ackerson: I don't understand it. But I

(Testimony of Walter R. Waldron.)

did have [63] Mr. Waldron identify this stationery and calling card in Exhibit 4 for identification.

Q. Is that the original stationery that you ordered at that time, Mr. Waldron?

A. That is right.

Q. And that is the first order for stationery, is it not? A. That is right.

Q. And that is the order that you were billed for in these early days? A. That is right.

Q. What was the name of the printing company, do you recall?

A. Yes. I think it is the Best, B-e-s-t, Printing Company here in Los Angeles.

Q. Now, Mr. Waldron, when did you first commence trying to lay the foundation in San Bernardino? Was that before or after your work here in Los Angeles?

A. It was after my work here. The only thing I did in San Bernardino was the mechanics, locating quarters, arranging for telephone and banking outlet there.

Q. When did you first start arranging for quarters or trying to arrange for quarters in San Bernardino? Was it before or after you had moved in your Atlantic address here? [64]

A. That was after, about 30 days after we moved in at Los Angeles.

Q. And what else did you do in San Bernardino? Did you do work prior to the time you found quarters in San Bernardino or was that the first thing you did?

(Testimony of Walter R. Waldron.)

A. No, the first thing we did was to find quarters, which we finally did, and arranged for a little before the first of the year or right at the first of the year.

Q. It was on or about the date of the lease in San Bernardino?

A. Yes. I negotiated that a few days before.

Q. Now did you contact contractors or put in a telephone or anything like that in San Bernardino prior to the date of that lease?

A. No, sir, we didn't do anything, or I didn't do anything in San Bernardino, and I was the one that did the work out there until after we got our telephone in, which was somewhere in about the middle of January, I believe.

Q. Now had you done anything in Los Angeles with regard to obtaining contracts or bidding on jobs in Los Angeles prior to your activities in San Bernardino? A. Yes.

Q. Where did you start in bidding first?

A. Almost immediately. Since we know that it takes at least from three to five or even as much as eight months from [65] the time you bid on a set of plans or blueprints until the job is ready for acoustical tile, which is along the latter part of the construction work, why we were immediately working and bidding. As soon as we got out take-off sheets made up and the preliminary work before that on a scratch pad, of which I have one over there, which I remember that I did some work on

(Testimony of Walter R. Waldron.)

before we had our regular estimating sheets made up.

Q. Well, then, I take it your answer is that you were bidding here in Los Angeles prior to the time you did any work over in San Bernardino?

A. Oh, yes.

Q. Do you recall, Mr. Waldron, any of these very first jobs you did either here or in San Bernardino?

A. Yes. We did one that was sent to us by Bob Ragland of the Pioneer-Flintkote people.

Q. Where was that located?

A. That was here in town—I can only think of Santee Street—that may not be right, but it was the Owens Roofing people.

Q. Now I am going to call your attention to Plaintiffs' Exhibit 4 for identification again and ask you if that has any identification or relation to this Owens Roofing job you did?

A. Well, this is the original contract, or a copy of the original contract. There is always two made. This is [66] the carbon under the original.

Q. And is the original given to the purchaser?

A. Yes, we leave that with the buyer, and this is a copy of it, and a copy of his signature. That was a job on Mateo Street.

Q. Is that the Owens Roofing job you are talking about? A. Yes, that is correct.

Q. Now you are referring to the green sheet in this exhibit, is that right?

A. That is right. [67]

(Testimony of Walter R. Waldron.)

Q. And that is the same sheet as you identified as your original printing order?

A. That is correct.

Q. Is it not? A. That is right.

Q. And this is the carbon of your own signature appearing there? A. That is right, yes.

Q. This is a carbon of R. James McLane?

A. That is correct.

Q. Now, you note that is dated January 3, 1952?

A. That is right.

Q. Now, Mr. Waldron, are the rest of these documents in this exhibit also related to that job?

A. Yes, this white copy is the job, the sheets that are sent to the job with the persons that are installing it, as an instruction sheet (indicating).

Q. In other words, when you make the first sheet—— A. Yes.

Q. ——you give that to your installers, or what was the word you used this morning?

A. Applicators.

Q. Applicators.

A. In this case that was me; I did the job.

Mr. Ackerson: I am going to offer this at this time. [68]

Mr. Black: May I see those documents first, Mr. Ackerson?

Mr. Ackerson: Yes, I thought you had seen them.

Mr. Black: I want to identify what the witness actually was looking at at that time.

Mr. Ackerson: I think the record should show

(Testimony of Walter R. Waldron.)

where I used the words "January 3, 1952," it should be "January 31, 1952," your Honor. The "1" being very faint. My eyes aren't as good as Mr. Black's.

Mr. Black: The date didn't seem to jibe there. There is no objection.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 4 was received in evidence.)

Q. (By Mr. Ackerson): Mr. Waldron, will you state, just as a matter of fact, as nearly as you can just the mechanical way in which this job came to you, how you learned about the job?

A. Well, Bob—I refer to Bob, Mr. Ragland. We had been long-time friends, since 1946 or '45. I hope you will excuse the informal term. Bob let us know about the job and told us that he would talk to the people, since they had no way of knowing we were part of the acoustical industry. We weren't in the book.

So he asked us to find out about it. So I went over there and talked to him. [69]

Q. You talked to Mr. Ragland?

A. Mr. McLane.

Q. McLane?

A. McClure—I am not sure of that name.

Q. McLane.

A. Yes. They wanted this work done and we handled Flintkote material, and they in turn worked very closely with Pioneer-Flintkote and

(Testimony of Walter R. Waldron.)

roofing materials, so they felt that was real good. And they let us go ahead and do the job.

Q. Did they require you to bid on the job?

A. No, there wasn't a competitive figure there at all. We were the only people——

Q. Whom did you talk to over there, Mr. McLane? A. Yes, Mr. Jim McLane.

Q. Do you know what position he occupies in Owens Roofing? A. He is the president.

Q. I believe you stated you installed this job yourself. A. Yes, I and one other person.

Q. Who was the other person?

A. William Yeomans.

Q. Do you recall having any conversation with Mr. McLane? A. Yes. [70]

Q. At the time you installed the job?

A. Oh, yes. He was there watching us do the work.

Q. Will you relate the circumstances and the conversation with Mr. McLane?

Mr. Black: That is objected to, if the court please. I can't see how that can be relevant or material. It is not binding on The Flintkote Company. I don't know the purpose of it.

Mr. Ackerson: I would like to have Mr. Black reserve a motion to strike, if it isn't connected up with The Flintkote Company.

Mr. Black: Very well.

The Court: In the present posture of the case it would be legally objectionable, unless you are willing to go along with Mr. Ackerson's suggestion.

(Testimony of Walter R. Waldron.)

Mr. Black: If counsel would be good enough to explain the purpose of the offer——

Mr. Ackerson: Well, I will ask the court and jury both to excuse me. I will tell Mr. Black, because if I am wrong I don't want it to go before the jury.

The Court: All right. You just go over and tell him. It might be a proper legal ground, but it isn't apparent on the present record.

Mr. Ackerson: There is no objection to that extent?

Mr. Black: No. [71]

Mr. Ackerson: If there is anything else, Mr. Black, you may have it stricken.

Mr. Black: Very well.

Q. (By Mr. Ackerson): Would you state the circumstances of this installation and any conversation you had with Mr. McLane at the time you installed it?

A. Yes. I asked him how he found out about us, and he said he called, or, Bob dropped in or one of the salesmen dropped in, and they were discussing the need and they learned that the Flintkote people were—learned or knew that the Flintkote people had acoustical tile and so they decided they would use it. And they wanted to know who would do the job for them.

So they were—we were recommended to them, or vice versa. I don't know, but it was in that conversation with Jim McLane—by the way, he is the

(Testimony of Walter R. Waldron.)

son of—I think the father was there, too, at the time.

Q. You are relating a conversation with Jim McLane and son? A. Yes; Junior, I believe.

Q. There are two McLeans in Owens Roofing?

A. I didn't know the father's name.

Q. Did Jim McLane—or is that all the conversation you had with Jim McLane?

A. The only thing I can think of that would bring him [72] to us, that they asked him, or Bob asked him to allow us to figure the job for him.

Q. You stated you had no competition on that job? A. So I was told by Mr. McLane.

Mr. Ackerson: I would like to call the jury's attention to the facts in connection with Exhibit 4. I do offer it, if I haven't.

The Clerk: It was received. [73]

Mr. Ackerson: So I want to call your attention to the fact that this original stationery of the aabeta company does contain the address of both Los Angeles and San Bernardino.

Q. Now, Mr. Waldron, this Owens Roofing Company job was one of the first ones you actually installed in this area, wasn't it?

A. I believe it was. We were getting rather active right along in that time, and I don't know for sure but I think it was.

Q. Where did you get the tile? Did that come from this first order of Flintkote tile, or did it come from some other source?

(Testimony of Walter R. Waldron.)

A. No, that came from the first order that Pioneer-Flintkote shipped us.

Q. That brings up the purchasing of this first order of Flintkote tile. Will you state from memory how that order came about?

A. How we put the order in?

Q. Yes. How did you happen to place your first order for Flintkote tile?

A. Well, Mr. Ragland informed us early in December of '51 that there would be a shutdown of the manufacturing plant right around the first of the year, and they didn't how long it would stay shut down for changeover of machinery [74] of some kind, and he urged us to buy at least one car of tile so that we would have materials on hand for anything that might come up that that particular size of material would do for in the event there was a long shutdown.

Q. How did Mr. Ragland notify you or make that statement, by telephone or what?

A. Yes, he called my partner, Elmer, and they arranged for us to—Elmer called me to come down to the shop, and Bob came by and we went—either then or prior to that moment Elmer had purchased a little purchase order book at a neighborhood stationery store—and we left from there and went to a Colonial Club restaurant for lunch. It was pointed out to us by Bob that we had to have some kind of something as an order, he just couldn't take any order as a purchase order.

Q. Referring to Mr. Ragland now?

(Testimony of Walter R. Waldron.)

A. Yes. And after purchasing this little purchase order book in a stationery store, the three of us went over to this cafe and Bob wrote up this thing, and I signed it. And they have numbers on it in sequence, I believe.

Q. Who was there, yourself, Mr. Ragland and who else? A. Mr. Lysfjord.

Q. Just the three of you? A. Yes.

Q. Did you actually meet at your Atlantic Avenue address [75] prior to going to this restaurant? Is that what you stated?

A. Yes, that is right.

Q. Mr. Waldron, how many times, if any, had Mr. Ragland been to this Atlantic address prior to this meeting?

A. You mean to make the purchase?

Q. Prior to the time you had this purchase order meeting.

A. I don't know but that particular time must have been right around the 10th of the month of December, but I can't remember whether he was there earlier right now. But he was there many times immediately afterwards.

Q. Now when you signed this purchase order then Mr. Ragland took it with him, I guess?

A. That is right.

Q. To Flintkote? A. Yes.

Q. You don't recall the number that happened to be on that purchase order, do you?

A. No, I don't recall it at the moment.

(Exhibiting document to counsel.)

(Testimony of Walter R. Waldron.)

Mr. Ackerson: May I have this marked for identification as the next exhibit in order?

The Clerk: Plaintiffs' Exhibit 8 for identification. [76]

(The document referred to was marked Plaintiffs' Exhibit No. 8 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, did you subsequently receive an invoice from the Flintkote Company for that first order of tile?

A. Yes, we did.

Q. I am going to show you Plaintiffs' Exhibit 8 for identification and ask you if that happens to be the document or a copy of it.

A. I am sure that this is a copy of it, and apparently our order number is on there direct from that early purchase order book.

Q. And that order number is shown to be what?

A. 2351, and that is under "your order number," meaning us.

Q. And do you see another order number there, any other number?

A. And our order number, meaning Flintkote, is C-35951.

Mr. Ackerson: I will offer this in evidence at this time.

Mr. Black: No objection.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit No. 8 for identification was received in evidence.) [77]

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I will pass it to the jury. There is no obligation, ladies and gentlemen, for you to look at everything on there, but I wanted to give you a chance.

The Court: You might scan these exhibits anyway just so you will kind of index them in your mind. During the period of your deliberations in the jury room you will have at the close of the case all exhibits and you may have them for all the time that you will need.

Q. (By Mr. Ackerson): Mr. Waldron, on this —let us call it the purchase order meeting—was there any discussion as to shipping address or anything of that sort?

A. Yes, we were—or, rather, I had understood that by carload lots it would be necessary to take it and put it in one place, otherwise there would be an extra charge for split carlots.

So the Atlantic address would not hold a carload of material, with our scaffolding and equipment and office space that we had there, and I didn't have a San Bernardino place other than the fact that I am associated with the California Decorating Company that has a large yard in addition to their buildings, and my plan at the moment for lack of a better place to put it, I gave the address of the California Decorating Company. I knew that if I didn't have a place by that time that I could store it there. [78]

Q. And do you recall the address of the California Decorating Company?

(Testimony of Walter R. Waldron.)

A. Yes. That is 1085 Pacific Avenue, San Bernardino.

Mr. Ackerson: Now I would like to call the jury's attention to the exhibit which you are looking at and the date of that exhibit is on there. I believe you will find that it is December 11th, that is the purchase order date on that exhibit. If I am wrong you will note it, but I would rather do it that way than to stop and read it now.

Q. Were there any change of orders on the shipping instructions that you were responsible for or was the merchandise delivered to that address?

Mr. Black: May I interrupt at this time, counsel? I think just to clarify this invoice, it should be stated that there is a typographical error which might otherwise confuse the jury. The figure "5700" I think everybody agrees should read "57,000."

Mr. Ackerson: That is true.

Mr. Black: And I invite a stipulation that that is an order for 57,000. The invoice shows 5700.

Mr. Ackerson: Yes, it does in one spot and in the other spot it is—no, I think you are right.

The Court: What is the exhibit number?

Mr. Ackerson: That is true. It is 57,000 one-half inch tile and the rest of it is the different [79] size.

Mr. Black: It makes up a total, as you can see, of 59,000 square feet on that figuring, instead of apparently 7700 which of course is otherwise misleading.

(Testimony of Walter R. Waldron.)

The Court: To which exhibit are you referring?

Mr. Ackerson: I am referring to the last exhibit, Plaintiffs' Exhibit No. 8.

Mr. Black: I didn't mean to interrupt you, counsel, but I am afraid it would be misleading to everybody.

Mr. Ackerson: I appreciate that because it has come up once before when you weren't here, Mr. Black.

Q. Now you have mentioned a number of meetings, or two or three meetings that you have had with the Flintkote people. Let's take the date, the beginning date of December 11th, the date of this order. Did you see Mr. Ragland—do you recall seeing Mr. Ragland subsequent to this December 11th day? A. Oh, yes. [80]

Q. Where did you see him?

A. The dates I don't remember, but he would frequently drop by our office here in L.A. before—it would be as early as 8:00 o'clock in the morning. He would mention he would stop by before going to his office.

Q. Is his office somewhere in the vicinity?

A. Yes, it isn't so great a distance, five minutes by car, I suppose.

Q. How often would you say that occurred between December 11, 1951, and February 15, 1952?

A. I would say a couple of dozen or more.

Q. In other words, he was quite a frequent visitor there, is that right?

(Testimony of Walter R. Waldron.)

A. Oh, yes. He made every effort in the world to help us get going.

Q. Do you recall a prospective job called the Lido job? A. Yes, I do.

Q. What was the Lido?

A. The Lido, it is a sort of an apartment hotel in Hollywood, and on the first floor they have a restaurant area. And they were remodeling, and he stopped by the house and left word for me to go and take a look at it for any possible work that we could do in there.

Q. By "the house" what do you mean?

A. I am sorry. My home. [81]

Q. Your own home?

A. Yes. It is right near that job.

Q. Mr. Ragland went by your house frequently?

A. Yes. That is en route to his home in the San Fernando Valley area.

Q. You state that Mr. Ragland called your attention to the Lido job at your home then?

A. Yes, that is true.

Q. Was that prior to, say, February 15th of '52?

A. Yes, it was some little time. I can't remember just when.

Q. Do you recall receiving notice of any other job in this area from Flintkote?

A. Yes, we received by mail from the Flintkote people a request that the public job, that is, the school job, UCLA, I believe—they in turn sent to them a request, requesting a bid of installation,

(Testimony of Walter R. Waldron.)

which they don't do. They in turn forwarded it to us at the Bell address.

Mr. Ackerson: May I have this marked Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiffs' 9 for identification.

(The document referred to was marked Plaintiffs' Exhibit 9 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, in connection with your last answer, can you identify this exhibit, Plaintiffs' [82] 9 for identification, as this notice that was received at your Bell address from the Flintkote Company?

A. Yes, that is correct.

Mr. Ackerson: I will offer that in evidence at this time.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit 9 was received in evidence.)

Q. (By Mr. Ackerson): Do you recall whether or not that job related to work in San Bernardino?

A. What job, sir?

Q. The California University job, Exhibit 9 in evidence.

A. No, that would be in the Westwood area.

Mr. Black: I will object to that. The document speaks for itself.

Mr. Ackerson: You are correct, Mr. Black; I am sorry.

Q. (By Mr. Ackerson): Can you look at this and state? Santa Barbara (indicating).

(Testimony of Walter R. Waldron.)

A. Where do you see the "Santa Barbara"?

Oh, yes. That was the one for Santa Barbara, Santa Barbara College.

Mr. Ackerson: I stand corrected, Mr. Black; I knew that and I thought the witness knew it, too.

Q. (By Mr. Ackerson): Did Mr. Ragland [83] during this period prior to February 15, 1952, ever call your attention or refer your attention to other contractors or prospective jobs in the Los Angeles area or elsewhere?

A. Yes, Mr. Ragland gave us a copy that they evidently had made up for just reference, and names and addresses of people that acoustical contractors work with.

I don't know who had it made up, but he gave it to me, and in turn marked off certain people that he was acquainted with and it covered the Los Angeles architects and engineers and various contractors.

It also covered San Bernardino and East L.A., Palm Springs, and various places out there. Since he had worked out there many years he made note on there, checked off the ones he was best acquainted with and thought we should call on those at our earliest convenience.

Q. You had never operated in the San Bernardino area or outside the Los Angeles area, had you, as a salesman? A. No.

Q. You were not acquainted out there at all at that time?

A. No, not for general contractors. Any work

(Testimony of Walter R. Waldron.)

we did was through local contractors in the past, that would have a job out in that area, and then in turn I would go out and take care of the job or take a look at it.

Q. Do you have those papers you are referring to in [84] the courtroom today?

A. Yes, they are with that black book (indicating).

Q. I show you a sheaf of papers here and ask you if you can identify those as the papers or part of them?

A. Yes. Mr. Ragland wrote here a name of a company, Dowd-Hoffer Company, contractor in Fontana. Then in turn he marked off others in Claremont and Ontario and Palm Desert, and wherever he knew contractors that he worked with as a salesman with the Shugart Company.

Q. Are you referring to all these papers that I am showing you?

A. The others here are the Los Angeles area, Beverly Hills vicinity, Wilshire district. This, of course, is more voluminous because there are so many more here. That is the Wilshire district and east of Vermont and the South Los Angeles area, Silver Lake district, Valley west of Laurel Canyon, Studio City, Van Nuys, Burbank, North Hollywood, and, of course, we were acquainted here just about as well or even better than Bob, so he didn't make any notes on that. This was all stapled together at one time, as you will notice, and it has come apart now.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I would like to have these sheets stapled back together and marked Plaintiffs' Exhibit next in order for identification.

The Clerk: Plaintiffs' 10 for identification. [85]

Mr. Ackerson: Your Honor, I realize I am violating the rule of the court here by bringing out certain exhibits that Mr. Black hasn't seen.

I think your Honor should know he has seen everything except a very few exhibits. This won't go on.

The Court: Well, if you feel there is something detrimental to you, Mr. Black——

Mr. Black: This one I haven't seen.

The Court: ——you can take a recess.

Mr. Ackerson: I think that would be in order, your Honor. This is rather a lengthy matter.

The Court: You are suggesting a recess?

Mr. Ackerson: Yes.

The Court: All right. We will recess until 3:20.

(The document referred to was marked Plaintiffs' Exhibit 10 for identification.)

(Short recess taken.) [86]

Q. (By Mr. Ackerson): Mr. Waldron, I am calling your attention to Plaintiffs' Exhibit 10 for identification, and to the first page of that memorandum. Can you identify from personal knowledge whose writing in pencil appears on that page?

A. Yes, this construction company name here was written by Mr. Ragland in my presence.

Q. And what about these check marks?

(Testimony of Walter R. Waldron.)

A. These were his also. He checked them all. And this particular one he made a couple of checks on because he was a little better acquainted there. That is why the two were there.

Q. And you are referring to the name Anderson Benjamin Hall, 265 South Garvey Avenue, at the top of page 1? A. That is right.

Q. Now does that testimony as to these markings apply to any other markings on the document?

A. Well, in the Los Angeles area here in South Gate and Whittier he has one marked there, someone he was pretty well acquainted with, the other people he worked with under him.

Q. But whatever pencil marks appear on these documents are Mr. Ragland's marks?

A. That is right.

Q. Now how did you come by this [87] document? A. He gave it to me.

Q. Where did he give it to you?

A. In my residence sometime early or late in November of '51.

Q. Was it before or after you had received your authorization to have Flintkote tile?

A. It was afterwards.

Mr. Ackerson: I will offer this in evidence at this time, if there is no objection, Mr. Black.

Mr. Black: No objection.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 10.)

(Testimony of Walter R. Waldron.)

Q. (By Mr. Ackerson): Now, Mr. Waldron, prior to the time you were notified that you could no longer buy Flintkote tile, had you done any job in San Bernardino? A. No.

Q. Had you done any job outside of the Los Angeles area?

A. Not to my knowledge at the moment. I don't believe so.

Q. Did you ever do a job in San Bernardino?

A. Oh, yes.

Q. That would be subsequent to the time [88] that your supply was terminated, is that correct?

A. That is correct.

Q. Now do you have in mind, Mr. Waldron, the manner in which you were informed that you could no longer buy Flintkote tile?

A. Oh, yes.

Q. Can you tell us the mechanical steps of how that came about?

A. Yes. My first knowledge of this was when I got a phone call in San Bernardino from my associate Lysfjord, and I phoned back—we had an answering service out there—I picked up this message and I phoned back and he said I should be in the Los Angeles office around 2:30 or 3:00 o'clock. So I immediately pulled out. He said it was considered important.

Then when I arrived there was Mr. Ragland, Mr. Baymiller and Mr. Thompson present with Mr. Lysfjord.

Q. And that was in the Los Angeles office?

(Testimony of Walter R. Waldron.)

A. Yes.

Q. Do you have any way of telling us the date of that meeting?

A. Well, I have it placed rather close in some notes I have that I keep virtually daily.

Mr. Ackerson: I will ask Mr. Black to follow this because I don't intend to use it for anything other than [89] refreshing the witness' memory.

Q. I am handing you some yellow sheets and a day book.

A. Well, these yellow sheets come up from the year of '51. I used this and the balance of them are over there. This is some stuff I had during the months of January and February, and I find, although I don't have dates on these, the way I worked with this sort of pad was that the blank sheet under my work on this sheet was the next day's work to be done.

And I find on this sheet a note of an address, and we had insured with a firm of this name here, Starr and Kraft, and along about February he decided—I don't know why he shouldn't give them to us earlier, but he finally came around and gave us one of these day books for advertising, perhaps he just had them made up, I didn't ask him—but anyway on February 1st that is when I started making notes in here. And I have various items, numerous here, things I did and it is almost day by day.

So I have here a sheet of February 19th. I was in San Bernardino on the afternoon of February 18th,

(Testimony of Walter R. Waldron.)

and I stayed overnight, and on the 19th I got the call, and the reason I believe this is it is that I had called "E" here—that is my associate, Elmer—and I made that call and then that ties in, this sheet will tie in, this particular piece of work here, Pacific Coast Terminal Warehouse, Mr. Druary, who [90] was evidently the maintenance manager. I was working with him to do a job here—let me turn the sheet here—here I find it. I was checking the job here, and I see out here I had "We are hi"—and I used the word "hi" for an abbreviation—"We are hi."

Before that I was over here sometime in that month, and it calls for three-quarter 12x12 acoustical tile, and I have a note here, "May not have enough in time, Bob will try to borrow." That is an occupied area and is already existing and therefore there wouldn't be any building delay. That is why that is there. [91]

Q. Who is Bob?

A. Bob is Bob Ragland. Now, this Burback here is the owner of the telephone service that I used in San Bernardino. And they had a note there, I guess, to call him.

I have other notes on this. I am still trying to get back to here (indicating), so these two tie together. When I quit using this work and started to use this, you see, then I find over here (indicating) I had a dinner engagement at the Arrowhead Springs Hotel on Thursday, February 21st.

Now, I think they opened that hotel expressly

(Testimony of Walter R. Waldron.)

for that association—I don't know. That might have been—one time they did; I was up there.

Anyway, Allied Construction Industries arranged a dinner there and they are an association of general contractors in San Bernardino. Jimmy Williams was the head of it at that time and he asked me to join that association. A lot of sub-contractors joined the general contractors association out there.

So this was preliminary arrangement, and to get acquainted so I might be accepted as an acoustical contractor in the association of the general contractors out there.

Now I remember of telling Jimmy Williams what had happened and I didn't know if I could continue at that time.

Q. What had happened? A. What? [92]

Q. What did you tell Mr. Williams had happened?

A. That our line of supply had been cut off and we didn't know at that moment if we could get any other. So he said, "Well, how did that happen?"

And I just told him, I said, "They just told us we were doing something wrong and they just cut it off."

Then, you see, I have blank pages here (indicating). This was a prearranged setup here. And then I find on Sunday, February 24th, I started looking for acoustical tile. I find I went to Davidson Plywood. I got ½ 12 by 12. That may not mean anything except to me. It is acoustical tile. And Insulite Company, and see Tom Crane—he is the head

(Testimony of Walter R. Waldron.)

of the fiberboard and acoustical tile—regarding acoustical tile plyboard, 3rd and Alameda. I tie down—I believe it is right. Thursday, February 19th they were in our office.

Q. Very well, Mr. Waldron. Now, let's get back to this meeting at your office on or about February 19th.

You have stated you came in from San Bernardino at the request of your partner, Mr. Lysfjord.

A. Yes.

Q. When you arrived there you found the three Flintkote representatives and your partner, Mr. Lysfjord? A. That is right.

Q. All right. Tell us what happened.

A. Well, after shaking hands around Bob [93] mentioned that the news—they have bad news for us and that Mr. Thompson would tell us about it.

Q. By "Bob" again it is understood you mean Mr. Ragland?

A. Yes. I am sorry about that. I have known him so many years I forget to be more formal.

At any rate, Mr. Thompson said that we were not to get any more acoustical tile, and that was his superior's decision, because we were operating in the Los Angeles area.

I asked him about the agreement we had at that luncheon that day, about wherever we work, and they had no restrictions on where we worked, and they didn't even tell us not to work in the Los Angeles area. As a matter of fact, they were most

(Testimony of Walter R. Waldron.)

happy we could continue with the business we had been doing here.

Q. Who said they were most happy? Is that your idea or did somebody say that?

A. At the dinner we had at the Manhattan Supper Club they wanted us to continue with the people.

The Court: "They wanted" is your——

The Witness: I am sorry.

The Court: ——interpretation of what someone said. You tell us what they said and the jury can decide whether they wanted it or whether you just thought they did.

The Witness: Yes. Mr. Thompson wanted [94] us to continue with the people we had been doing business with.

The Court: What did he say?

Q. (By Mr. Ackerson): What did he say? That is what we want, Mr. Waldron, and not your interpretation of what he said. The words he used, as near as you can remember.

A. He wanted us to be, or, asked us if we could continue selling the volume we were selling at that time with the people that we knew here in Los Angeles.

And we assured him we could.

Q. Very well.

A. Am I clear there, by the way?

Q. Yes. That is better. What did Mr. Thompson say when you reminded him of this?

A. He said, "We have nothing to do with it.

(Testimony of Walter R. Waldron.)

That—" I think he used the words "higher-ups." That is what is in my mind at the moment, and I believe I am right. That the higher-ups decided this, and "All we are to do is to carry it out, the order."

Q. What did you tell him, if anything? Did you say anything else?

A. No, other than I didn't think they were keeping their bargain.

Q. Do you recall anything Mr. Lysfjord said?

A. He pointed out the fact that they were backwatering on their former agreement, and that there was nothing ever [95] said about not doing business in any place. It was all agreed, to do business every place and to get going.

Q. That reminds me of another question that I will interrupt you for, Mr. Waldron. Did any Flintkote person ever tell you they restricted the area in which you could operate?

A. No. They assured us they had never had a restriction or restricted area up to that time, at least, and I don't know if they do now.

Q. During your experience as a salesman, did you ever work for an acoustical contractor that was restricted in the area in which he could operate?

Mr. Black: That is objected to as being incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. Ackerson): You may answer.

A. I don't know if I catch you quite right. Will you go through that again?

(Testimony of Walter R. Waldron.)

Q. Did you ever work for an acoustical contractor as a salesman where you were not permitted to take a job wherever you could get it, where there was a restriction of territory in which you could operate?

A. The only restriction we had was through transportation of men and subsistence. Wherever we could get a competitive figure on a job—in Bakersfield or any place else, we would have to send our men from here, which means [96] subsistence, and that, in turn, might throw us out of line with people who might be local; Bakersfield or Fresno, or anywhere else.

That was the only restriction, was economics. But not through sales written by or laws written by the manufacturer, that I know of.

Q. In other words, it was a matter of it costing you more to send men to Bakersfield or the contractor more to send them to Bakersfield than someone up in the area? A. That is correct.

Q. That reminds me of another question. Did you ever, prior to this termination date around February 19th have a crew of men established in San Bernardino?

A. No, we didn't establish a crew of men in San Bernardino at all.

Q. Did you have a crew of men down here prior to the termination date? A. Oh, yes.

The Court: What do you mean by "down here"?

Mr. Ackerson: In Los Angeles.

The Witness: In the Los Angeles area, that is correct.

(Testimony of Walter R. Waldron.)

Q. (By Mr. Ackerson): They were the only employees you did have, regular employees?

A. Yes, that is correct.

Q. At this meeting now, and I am going to call your [97] attention to another document, Mr. Waldron.

Mr. Ackerson: May I have this marked Plaintiffs' Exhibit next in order for identification?

The Clerk: Plaintiffs' 11 for identification.

(The document referred to was marked Plaintiffs' Exhibit 11 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, can you identify this document, Plaintiffs' Exhibit 11 for identification?

A. Yes, the Louis A. Downer Company of Riverside, who is an acoustical contractor, received this letter informing them of our activities in his [98] area.

Q. How did you receive it?

A. Mr. Downer gave it to us to show us their feeling, that any negotiations that he and we would work out was certainly all right by the manufacturers. In other words, we could sell him or he could sell us, or whatever it happened to be. And it showed here that anything that we worked out together was perfectly all right.

Mr. Ackerson: Mr. Black, I assume that we can stipulate to it—I realize that the testimony is just a little bit hearsay—but we can stipulate, I assume,

(Testimony of Walter R. Waldron.)

that that letter was sent by Flintkote to the Downer Company?

Mr. Black: Yes, so stipulated.

Mr. Ackerson: Then I will offer it in evidence.

The Court: What is the exhibit number?

Mr. Ackerson: Exhibit No. 11.

Mr. Black: Would you give me the date of that, Mr. Ackerson?

The Court: Subject to the stipulation, it is received.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 11.)

Mr. Ackerson: The date is January 17, 1952, Mr. Black.

I would like to read just a portion of it to the jury, and then I will hand it to the jury for further perusal.

It is addressed to the Louis A. Downer Company—which, I might interpolate by stating that that is not the Downer [99] Company mentioned as a co-conspirator; I think it is a son or a brother operating a different company over in San Bernardino—it is addressed to the Louis A. Downer Company, 6840 Valencia Street, Riverside, California, and it states in part:

"Your letter of January 14, 1952, to our Mr. Bob Ragland, has been referred to the writer for answer.

"This company, while offering no exclusive fran-

(Testimony of Walter R. Waldron.)

chise agreement, have recently placed the acoustical tile line in the Riverside and San Bernardino area with the aabeta company of 901 Waterman Avenue, San Bernardino.

"We respect our customers' position in every way possible without a binding agreement of any exclusive franchise, which we believe is to the advantage of both the contractor and the supplier.

"For the above reason, we regret that we will be unable at this time to offer you our acoustical tile line on a direct basis. You are at liberty to make whatever arrangements you desire in working with the aabeta company to obtain Flintkote acoustical tile, and we believe that our customer will offer you full cooperation."

Then it is signed "B. B." for B. Baymiller.

Q. Now, Mr. Waldron, do you have personal knowledge as [100] to the area in which the Louis A. Downer Company operates?

A. Yes. How do you mean, area?

Q. Do they do contracts outside of the Riverside-San Bernardino area? A. Oh, yes.

Q. They do have contracts to your knowledge in the Los Angeles area?

A. Yes, that is right.

Mr. Black: If the court please, I want to renew our objection to this line of testimony on the theory that it can't have any bearing whatever on what arrangement the plaintiff may have made with the defendant in this case. As to what some other sup-

(Testimony of Walter R. Waldron.)

plier may have done with the Louis Downer Company, that can't possibly be binding on us or illuminating in any way.

The Court: I admitted the other evidence that you objected to on the basis that counsel was probably trying to give us a general picture of the practices of the industry and that that might be useful as a background for the particular practices in this case. But I wonder, Mr. Ackerson, aren't we getting so far collateral that it would tend to confuse rather than assist?

Mr. Ackerson: I think there is a little more basic purpose for this background material, your Honor. For instance, the price—I don't like to use descriptive words—but the [101] method of distribution to certain acoustical tile contractors, and so forth, because actually that forms the basis you have to have to compete. Now we haven't alleged, and we can't prove, that we can't buy tile at all. We can't compete by paying 17 per cent and 27 per cent for tile and be dependent upon our competitors to get it for the most part.

This letter here I think is material in this respect, that there is no statement in there, as I read it, of any objection to the Louis Downer Company buying tile from the plaintiffs and selling it or installing it at any place they want to.

The letter acknowledges that they have no exclusive franchises, and by that I expect to bring out that that includes territorial restrictions; that

(Testimony of Walter R. Waldron.)

it is simply inconsistent with the position and the action taken against my clients.

I am not, as far as this particular letter goes, too concerned with it, but I think there will be other circumstantial evidence tending toward inconsistency, that is all, the position that Mr. Black stated this morning which I no longer have to anticipate.

Mr. Black: Just a moment. We are talking about the letter which seems to me to be an entirely different thing from what this witness may know about what rights Louis Downer & Company may have had as to where they were entitled to operate. They are not a Flintkote contractor. [102]

Mr. Ackerson: I think on that ground, your Honor, I have to think that Mr. Black is correct.

The Court: You concede the objection?

Mr. Ackerson: I concede the objection.

The Court: The objection then is sustained.

Q. (By Mr. Ackerson): I want to ask you whether anything else happened at this meeting. Was anything said there concerning orders in the Los Angeles area?

A. You mean commitments?

Q. Yes.

A. Oh, yes, they assured us that any commitments we had at the time——

Mr. Black: Just a moment. Please tell us who said that rather than "they."

The Witness: I am sorry, Mr. Black.

The Court: Just tell us what he said. I am sure

(Testimony of Walter R. Waldron.)

the jury may not think it was an assurance from the words, but then again they might. But they should have the privilege of determining it rather than having to rely upon your interpretation that it amounted to an assurance.

Q. (By Mr. Ackerson): Who said what and what did they say?

A. Mr. Thompson told us that we would be assured of any commitments that we had made, materials to be installed, [103] contracts, sales, and so forth.

Q. Did you subsequently receive some material from the Flintkote Company?

A. Yes, they had us in a meeting and Mr. Baymiller went over our contracts that we had committed ourselves to, and made notes of them for shipment when we wanted them, except two. He denied two commitments we had, and that was to the Louis A. Downer Company. These two commitments, of which I believe you still have the old purchase orders, were to be used by them on a school job some place and I believe it was the Orange Coast College.

Q. Where was that?

A. That was somewhere southeast of town, the Long Beach area, or somewhere over in that area.

Q. Do I understand then that Mr. Thompson lived up to his statement that he would supply you sufficient tile to finish your commitments?

A. He did not.

Q. Excepting for those two orders from the

(Testimony of Walter R. Waldron.)

Louis Downer Company? A. Yes, he did.

Mr. Ackerson: Now will you mark those in order, please?

The Court: Plaintiffs' Exhibit 12 for identification.

(The exhibit referred to was marked as Plaintiffs' Exhibit No. 12 for identification.) [104]

Mr. Ackerson: And this next document dated March 3rd as plaintiffs' exhibit next in order for identification.

The Court: Plaintiffs' Exhibit 13 for identification.

(The document referred to was marked as Plaintiffs' Exhibit No. 13 for identification.)

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 13 for identification and ask you if that is a billing from The Flintkote Company for tile to perform these commitments Mr. Thompson mentioned.

A. Yes, that is the billing. We either received this one or a copy.

Q. And I call your attention to Plaintiffs' Exhibit 12 for identification and ask if the same thing is true about that?

A. Yes, I believe that is correct.

Mr. Ackerson: I will offer Plaintiffs' Exhibit 12 in evidence at this time.

Mr. Black: No objection.

The Court: Admitted.

(Testimony of Walter R. Waldron.)

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 12.)

Mr. Black: Could we have the invoice number so we can get straight which is which?

Mr. Ackerson: 28278 is Exhibit 12. [105]

And I will offer Plaintiffs' Exhibit 13 for identification in evidence, which is invoice No. 22875.

Mr. Black: Thank you.

The Court: Admitted.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 13.) [106]

Q. (By Mr. Ackerson): Now tell us, if you can in any more detail, just how this question of commitments in Los Angeles, if they were in Los Angeles, came about in this meeting of Mr. Thompson, Ragland and Baymiller. Did you bring it up or did they bring it up? What was said by each of them?

A. Mr. Thompson was the spokesman on the final details, and he asked us to bring in whatever commitments we had, contracts, sales and any other where acoustical tile was concerned, and they would honor them.

Q. By bringing them in, he meant back to the Flintkote Company?

A. Yes, they asked us to come over there, show them to them, which we did, and I showed them to

(Testimony of Walter R. Waldron.)

Mr. Baymiller at a later time after this first severance meeting.

Q. And did I understand you to say that Mr. Baymiller at that time took notes on the commitments you brought to him?

A. Yes. He noted the amounts, he didn't keep the contracts but he noted the amounts, job name and probable starting dates, I think, for the delivery time, a certain number of given months ahead or weeks ahead, or however soon we had to have them, except he refused to honor the Louis A. Downer Company purchase orders.

Q. Did he state any reason to you why he refused to [107] honor that, the Louis Downer orders?

A. I asked him why. He said that is a commitment, that they were not honoring the Louis A. Downer & Company commitment, and that they couldn't, they just couldn't honor that purchase order. There were two of them. He said, "I just can't do it."

And the significant thing that I think ties that together is, a man came up at that very moment—I don't know who he was—apparently a salesman or an office personnel, and he mentioned to Mr. Baymiller that they had been successful in stopping the 24 x 48 inch acoustical tile consigned to the Louis A. Downer Company by way of the McNulty Acoustical Company in Bakersfield, that was going on the Orange Coast College. So that ties in with the refusal or denying our commitments to the Louis A. Downer Company. [108]

(Testimony of Walter R. Waldron.)

Mr. Ackerson: May I ask one question before you——

Mr. Black: Go ahead.

Q. (By Mr. Ackerson): This statement, you don't know who made this statement, the individual? A. No, I don't.

Q. It was made to Baymiller in your presence?

A. That is right. I was sitting at his desk.

Mr. Ackerson: Thanks, Mr. Black.

Mr. Black: I will move it be stricken as incompetent, irrelevant and immaterial, not binding on the defendant in any way. There is no authority proved by "this person." We don't know what his status was or whether he had the right to make such a statement.

It seems to me it is too far afield to form the basis of this witness' deduction as to motives involved in the case.

The Court: Mr. Black, the court was surprised. Usually when a witness starts volunteering something of this sort, there is an immediate objection and the court, of course, will always stop the witness, because it is not proper procedure.

I am afraid you sat back to see what he was going to say.

Mr. Black: I stopped, if the court please, at counsel's expressed request. He asked me to let the witness finish his statement so he could understand what it was.

The Court: Just bear in mind that judges are inclined, [109] if counsel waits until a state-

(Testimony of Walter R. Waldron.)

ment which manifestly from the beginning is legally an improper one, and counsel waits to see whether it turns out to be an answer which they are willing to live with or one they want stricken, judges are inclined to say, "You took the risk. You live with the results."

We won't do that to you this time, Mr. Black, in view of the attitude between you and Mr. Ackerson generally.

That entire answer is stricken. I am just warning you as to the future.

Mr. Ackerson: No objection, your Honor.

Q. (By Mr. Ackerson): Mr. Waldron, would you recognize Mr. Baymiller's handwriting if you saw it?

A. Only his signature. I have seen that several times. I believe I could recognize that.

Q. Well, I am not going to ask you to identify the handwriting. But I am going to ask you if you can identify the subject matter on this plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' 14 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 14 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, Plaintiffs' Exhibit 14 for identification is composed of two documents. I am calling your attention to the second page of that exhibit, [110] and I will ask you if the substance of that handwriting refers to the jobs to which you were committed and to which

(Testimony of Walter R. Waldron.)

you called Mr. Baymiller's attention on this occasion you testified to.

A. Yes, there are three different jobs here. However, I am not sure that that was all at the moment.

Q. But you do recognize these two jobs——

A. Yes.

Q. ——as jobs you called to Mr. Baymiller's attention?

Mr. Ackerson: Mr. Black, I will postpone offering this at this time in view of the other document.

Does your Honor recess around 4:00 or do we go over? This is a stopping point, if that is in your mind.

The Court: I had in mind carrying on for about a half hour. If that is inconvenient to anyone, I wish you would bear in mind that business is quite concentrated here now.

I have been away for a month sitting in another division, I just got an order from Judge Denmam to go to another division for another month, and a lot of cases must get cleared up before going.

So I would rather work until 4:30 and start at 9:30 in morning.

Mr. Ackerson: The 9:30 time in the morning would be quite convenient. I am afraid I anticipated incorrectly. I do have a rather important appointment about 4:30 in the [111] office. I will make some other arrangements if we can't make up the time some other way.

The Court: Will 9:30 be convenient with you, Mr. Black?

(Testimony of Walter R. Waldron.)

Mr. Black: Yes.

The Court: Will it be inconvenient to any member of the jury to be here at 9:30 tomorrow?

(No response.)

The Court: The case will then stand in recess until tomorrow morning at 9:30 and we will try to work until tomorrow afternoon at 4:30. On Monday we will not convene until after noon. I have a motion calendar on Monday morning.

Members of the jury, let me call your attention to the fact that there are a lot of people interested in a case of this kind, connected with it, employees and friends, witnesses, attorneys for the various parties and concerns, and just before and after court time and at recess they mill around in the hall and talk about the case.

You have heard me tell you yesterday that you are not to receive any information outside of the court, and not to listen to discussions or participate in any way.

Just to make it easier for you to follow that, may I ask you when you leave, to leave through your jury room on the third floor and don't return to the corridors on the second floor at all. [112]

Then you will miss being put in close contact with these people who will naturally be talking about the case.

When you come in in the morning, if you will take the elevator to the third floor, go to your jury

(Testimony of Walter R. Waldron.)

room and wait there until you are called down into court, and it will save the possibility of embarrassment by your coming in contact with some interested person in the hallways on this floor.

We are now in recess until tomorrow morning at 9:30.

(Whereupon, at 4:05 o'clock p.m., Thursday, May 5, 1955, an adjournment was taken to Friday, May 6, 1955, at 9:30 o'clock a.m.) [113]

May 6, 1955—9:30 o'Clock A.M.

The Court: I understand that there is an ex parte motion. Maybe it won't be ready until 10:00 o'clock. Is it ready now?

The Clerk: No, sir.

The Court: When they come in we will take it up before the recess and we will plan on the recess at about 10:45.

Mr. Ackerson: We will have the witness resume the stand.

WALTER R. WALDRON

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Waldron, when we adjourned last evening——

The Court: Just a moment. I had better tell

(Testimony of Walter R. Waldron.)

the clerk about our action in a case before I forget it.

The Carl Parker Enterprises, which is set for trial here Monday, will be tried Tuesday at 11:00 o'clock. The case is continued until Tuesday at 11 o'clock on the court's own motion. It is a short matter.

You may proceed.

Q. (By Mr. Ackerson): As I stated, Mr. Waldron, you were testifying at [115] the close of yesterday's session concerning the so-called termination meeting in or about February 19, 1952. Do you recall any other conversations at that meeting that you have not covered as of yesterday?

A. I believe we covered the severance—the termination in their voicing to us at that time— and of course it was like exploding slightly a bomb in our office—but I asked Mr. Baymiller if they wouldn't hold up, or why they didn't hold up, to our agreement, and that I said the pressure must have been terrific. And he said, "Yes, we had the pressure all right."

Q. Was there anything else you recall, or does that about cover that meeting? I mean that plus your testimony of yesterday.

A. I believe I covered the fact that they said that they couldn't do anything on their own behalf, that it came from their superiors.

Q. Did you ever have a conversation with Mr. Ragland concerning any objections to your going into business? A. To going into business?

(Testimony of Walter R. Waldron.)

Q. Or continuing in business? Did you ever discuss a subject like that with Mr. Ragland?

A. Oh, yes, many times. Not many times, but there were times when he could stop by our shop, and we would go to the nearest cafe, which was a Stan's Drive-in I believe, [116] and we discussed the chances of the opposition, or I will say the competition, of being particularly perturbed and angry when they learned that we were in business.

And he knew that.

Mr. Black: Just a moment. What did he say?

The Witness: Pardon me.

Q. (By Mr. Ackerson): What did he say?

A. Mr. Ragland would say that there is no reason to worry about it, that The Flintkote people will back up their word.

Q. Did Mr. Ragland ever call any specific instance to your attention where a complaint had been made about you doing business?

A. Yes, right along about that time——

Mr. Black: Just a moment, before the witness testifies on that. Let us have the time and date and the circumstances.

Mr. Ackerson: Thank you.

Q. Will you state if you had such a conversation, where and when it took place?

A. Yes. At our office. Mr. Ragland came in and was telling us about——

Q. And when was that, Mr. Waldron?

A. This was prior to the severance date, shortly after that. [117]

(Testimony of Walter R. Waldron.)

Q. Can you estimate the amount of time prior to this February 19th date that this occurred?

A. Yes, I would say a couple of weeks or even along about the 1st of February.

Q. And what occurred—and that took place at your Los Angeles address? A. Yes.

Q. What did Mr. Raglund tell you?

A. He was telling us that Mr. Gus Crouse—Coast Insulating Products—came down and was particularly angry, and that he got out of line——

Mr. Black: I would like at this time to interpose an objection, if the court please, on the ground that Mr. Ragland is not shown to have authority to make any statements binding on the Flintkote Company, and that the evidence proffered is incompetent, irrelevant and immaterial. There is no authority of Mr. Ragland to make statements of that sort of an historical character as to what had happened which has been shown.

Mr. Ackerson: I think perhaps, your Honor, that this is in the form of an admission, in the first place. In the second place, I think Mr. Ragland's past conduct throughout this period shows that he was an authorized agent.

The Court: Are you contending that Ragland was a co-conspirator? [118]

Mr. Ackerson: Certainly. Well, he is either a co-conspirator, an agent of the Flintkote people—I mean there is no doubt about the latter.

The Court: As a general principle of conspiracy

(Testimony of Walter R. Waldron.)

law, every person who is a co-conspirator of course is presumed—that is, every person who is alleged to be a co-conspirator with the person on trial as conspirators, is deemed to be their agent once he is shown to be a member of the conspiracy, and statements which are made in furtherance of the conspiracy may be admitted.

I think the courts here have generally been admitting statements and doing so subject to a motion to strike if it does not appear that there develops a jury question as to whether there was a conspiracy, as to whether the person who is on trial and the persons whose statements have been received, have been connected to it.

Mr. Ackerson: I think that is right.

The Court: Unless you have some other way you would like to handle it, I am disposed to adopt that as a policy of this case, as the other judges have done in the cases tried before them, and entertain a motion to strike if the connection is not provided by sufficient evidence to create a jury question.

Mr. Ackerson: I don't know of any other way you can try a case like this, your Honor. [119]

Mr. Black: Your Honor please, it may be we are at that point where we should address ourselves to your Honor in the absence of the jury, because I think that we would like to be heard somewhat extensively on that proposition.

The Court: Then, Mr. Ackerson, can you for the next few minutes, between the time we take our morning recess, go to some other question and we

(Testimony of Walter R. Waldron.)

will hear counsel on this in the absence of the jury when we take the morning recess.

Mr. Ackerson: I might suggest, your Honor, we have been covering these conversations with agents of Flintkote for nearly a day, and I hadn't conceived that Mr. Black's lengthy argument would be directed at this sort of thing. There are other types of evidence where it might be appropriate.

Mr. Black: Yes, but I think the court has indicated a treatment of the entire subject which I think brings about just as an appropriate an occasion here on the subject as anything else, because it ties into the same general line of argument, and I think for that reason it would be well to get onto another subject if you have one and let us present this all at one time.

The Court: If you have your schedule of questions organized, Mr. Ackerson, I will—it is not convenient to deviate from it inasmuch as there has been no suggestion of a reason why we should depart from the usual rule up to now, and I would think that the suggestion that we adopt some [120] other rule should have been set forth in a trial memorandum.

Mr. Black: That is one of the very points at issue, if the court please, as to whether it is the rule. We have some authorities on that that we would like to present, and I really believe it would be inappropriate to make that argument in the presence of the jury.

The Court: Why weren't they presented before,

(Testimony of Walter R. Waldron.)

Mr. Black, because this is the usual procedure?

Mr. Black: The question hadn't arisen in the trial until now.

The Court: You anticipated it would, though?

Mr. Black: We anticipated it would.

The Court: Did you file a trial brief?

Mr. Black: We have not filed any trial brief.

The Court: Objection overruled. I will not have so many of these but what I can strike them if it turns out to be illegal after hearing your argument, and I will hear you fully at the time the jury takes its morning recess.

Mr. Black: Thank you [121]

Mr. Ackerson: I am about through with this particular conversation. I think this is the last such conversation.

Q. (By Mr. Ackerson): Will you relate that conversation with Mr. Ragland?

A. Did I have——

Q. Will you relate that conversation you had with Mr. Ragland you started to talk about?

A. Yes. He was telling me that Gus Crouse of the Coast Insulating Products, a distributor of theirs——

Q. What position, if you know, did Gus Crouse hold with Coast Insulating?

A. He was general sales manager. At least, he was at that time.

Q. State what Mr. Ragland told you.

A. Mr. Ragland said that he came to their office —or his office and his desk, and got so abusive

(Testimony of Walter R. Waldron.)

that he had to tell him that he would have to leave him and when he could be more rational he would return.

Now, he was telling him that they wouldn't stand for us, the aabeta co., selling acoustical tile.

Q. Did you say——

Mr. Black: Just a moment. I wish the record to show we move to strike this answer in pursuance of our objection.

The Court: Ruling will be reserved until after I hear your argument. [122]

Members of the jury, there is objection to this testimony. The objection is a legal one and you should keep in mind that you are judges now; for the purpose of the facts of this case you are judges of the court as much as I am.

For the purpose of the facts of the case you are more a judge of the court than I am, because your decisions on the facts will be accepted by every higher court to whom this case might go.

Now, it is a quality of judges that they disregard evidence which is not proper. I think this evidence is proper and that this procedure is proper.

Mr. Black, who, with all respect to Mr. Black and in deference to the fact we are all growing older, to me, I think, is senior. This Mr. Black is a leading member of the Bar.

Mr. Black thinks this particular evidence is not admissible. Since the question is raised at the eleventh hour, after we are in trial and under our procedure, being one which would reasonably be an-

(Testimony of Walter R. Waldron.)

ticipated should have been raised by a pre-trial brief, I am going to let it in until recess. But I might hereafter instruct you to disregard it. So just keep your thoughts regarding the case organized to where this particular line of questioning will be pegged so that you will be in a position to disregard it if it becomes the court's instruction later you do so. [123]

In the interest of expedition we are going to have it now.

Mr. Black: May the record show, if the court please, there was no pretrial had in this case. Any inference we were in default in some way, I don't think is quite fair to us.

The Court: Well, as to there not being a pre-trial, I think we are all at fault. But that wasn't what I was commenting on, Mr. Black. It was the fact you didn't file a brief.

There is a local rule which requires that a certain number of days before the trial each party file a memorandum with the court, pointing out the legal questions anticipated to arise, pointing out the law they wish the court to read on it and what their position is going to be on those questions.

That rule should particularly be observed in cases which are not the ordinary garden variety which occur here every week.

Now, in this case, so far as I know, neither side has filed a trial brief.

Mr. Ackerson: That is correct.

Mr. Black: I think if the court will be fair to

(Testimony of Walter R. Waldron.)

both of us usually that is handled, is it not, in connection with a pre-trial hearing and notice to counsel as to the dates on [124] which that is required.

I may have erred on that, but I just assumed that, there being no pre-trial hearing, the court wasn't requiring the filing of a memorandum.

The Court: The fact a pre-trial hearing wasn't ordered in this case did not repeal the published rules of this court, which were adopted by all the judges and go back to the days of Judge James, who has been dead now, I think, 15 years. But those rules have been published and republished in the Journal and you can buy them down at Smith's law bookstore for 50 cents. Most of the lawyers practicing before the court do obey them.

The result of not doing so is to put the jury in a position where you are going to require snap judgments as we go along. And lawsuits should be tried at a pedestrian pace, with all the legal points considered.

I am going to try this one with the law as I remember it, until you point out some new development showing the law is either different or my memory has become twisted.

The failure to file a trial brief weighs as heavily on Mr. Ackerson as it does on you.

Mr. Ackerson: That is true, your Honor. Frankly, I hadn't anticipated that there would be objection—not to this testimony—but to what I believe Mr. Black has in mind until I was notified the

(Testimony of Walter R. Waldron.)

other day. I probably am at [125] fault in not anticipating it, anyway.

But, in view of the way the Complaint was drawn, I think it was clearly set out there that I intended to use the type of proof which has not yet been before your Honor, and which will be the subject matter of this argument.

The Court: Well, I am glad you are both sufficiently busy and prosperous that perhaps that is what has led to your disregarding the rules.

Mr. Ackerson: Your Honor, that appellation may apply to Mr. Black. I am just busy.

Mr. Black: I would like to join in that, your Honor.

Q. (By Mr. Ackerson): You were talking about Mr. Crouse's conversation with Mr. Ragland. Did he relate any further part of the conversation, or was that all?

A. That is as I remember it at the moment, and, anyway, Bob told me that he had to leave Mr. Crouse and then come back at a later date when he was quieted down.

But Mr. Crouse called me and told me about that incident.

Mr. Black: Just a minute. That is objected to for a further reason that this is an alleged conversation between a third party, not in the presence of The Flintkote Company, and in no way binding on The Flintkote Company.

The Court: Isn't Crouse——

Mr. Ackerson: Crouse is strictly individually al-

(Testimony of Walter R. Waldron.)

leged [126] as a co-conspirator, your Honor. I think it may be subject to connection, but I think the rule is clear that co-conspirator's acts infer admission of an action in furtherance of a conspiracy and is binding, in any event.

Mr. Black: Not until the membership of the other party in the conspiracy is proved.

Mr. Ackerson: Well, we can't prove——

The Court: You can't prove these cases all at once. And the evidence is admitted subject to a motion to strike if it is not connected up.

Q. (By Mr. Ackerson): Will you proceed, Mr. Waldron?

A. Mr. Crouse, who is a social acquaintance of mine and has been for some time, called my home in the evening.

Q. Along about what date was it, before or after the termination?

A. It was after the severance. He tried a couple of times in days past and I wasn't home. However, he called this particular time and my wife answered the phone. He told her who he was and I was called to the phone.

And he told me that he didn't want me to feel that there was anything personal about his being chosen to front for the organization, association, which is the contractors association, and their own interests, to force this termination of selling us acoustical tile.

Mr. Black: That is objected to for the further reason [127] that it doesn't purport to be a state-

(Testimony of Walter R. Waldron.)

ment during the course of the alleged conspiracy, but an alleged statement, or, admission of some other person after the events had occurred.

We renew the motion to strike on the further ground as stated.

Mr. Ackerson: But an admission, I suggest to your Honor, is an admission of the very act that plaintiffs claim caused this termination.

The Court: What date is alleged as the termination date?

Mr. Ackerson: February 19th, I believe we have established, your Honor.

The Court: Of what year?

Mr. Ackerson: Of '52.

The Court: What is the date of the alleged conversation?

Mr. Ackerson: The conversation was subsequent to that concerning acts prior to February—acts of Crouse himself prior to the termination date.

The Court: The motion is granted. The conversation of a person not before the court, a conversation which would ordinarily be hearsay, in order to be admitted would have to be one made in furtherance of the conspiracy.

If the conspiracy had ended, it might in protection of the conspirators, but it could not be in furtherance of the conspiracy after the conspiracy is over. [128]

I think, under the general rule which is applied to cases of this character, that you are not absolved from the hearsay objection.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: No, I don't contend that, your Honor. I don't mean to argue after your Honor has ruled, but I wonder if your Honor understands the plaintiffs' position here.

The evidence will show that Mr. Crouse was one of the contractors and did directly contact Mr. Ragland and others at The Flintkote Company for the purpose of making them cease selling tile to the plaintiffs.

This conversation, though it occurred after Flintkote had actually terminated, was an admission of Crouse's part in causing the termination.

My theory, of course, was that an admission of an overt act that was in furtherance of the conspiracy would come within the general rule.

The Court: It would if Crouse were being——

Mr. Ackerson: I think maybe I will ask your Honor to permit me, during our more extensive argument, to ask you to recall your ruling if your Honor feels so at that time.

The Court: Yes, you can argue it at the time Mr. Black argues his motion.

Q. (By Mr. Ackerson): Then at this conversation with Mr. Ragland, did he name other acoustical tile contractors that had approached him concerning your doing business? [129]

A. Yes, he said a Mr. R. E. Howard——

Mr. Black: It will be understood our objection goes to this?

The Court: Yes.

(Testimony of Walter R. Waldron.)

The Witness: ——was down there complaining, also. [130]

Q. (By Mr. Ackerson): And what did he say that Mr. Howard said, if anything?

A. I don't know any exact words, except he mentioned that they were trying their best to force an issue to stop our operations.

Q. Now, Mr. Waldron, after your source of supply of acoustical tile was terminated by The Flintkote Company, were you able to carry on your acoustical tile business?

A. Not for some time.

Q. Did you do any bidding after that date for some time and, if so, how long a time?

A. We didn't do any bidding for a couple of months other than with the material we have had before.

Q. By the "material you have had before," do you mean the material you got in this first shipment of tile? A. Yes.

Q. Can you explain just how you did carry on after that termination with respect to your acoustical tile activities?

A. The acoustical tile was curtailed, and later on, a month or two or three, we were able to line some materials from lumber yards and the E. J. Stanton people had some, the Harbor Plywood, and we were able to eventually get some.

However, the Harbor Plywood supply was not an AMA rated [131] material, so it was limited to where we could put it, and any of this material we

(Testimony of Walter R. Waldron.)

had to pay a premium of around 17 per cent to 20 per cent greater than we had paid before.

Q. Can you name some of these places where you bought this tile at that price?

A. Yes, we bought from the Harbor Plywood people, E. J. Stanton people, and Louis A. Downer, acoustical contractor.

Q. Do you have personal knowledge of——

Maybe Mr. Black won't object to the introduction of this.

(Exhibiting documents to counsel.)

The Court: Members of the jury, don't hold it against either counsel that they object or make motions to have evidence held out. That is one of the things they are paid to do.

The Clerk: Plaintiffs' Exhibit 15 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 15 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, can you identify this document that I am showing to you marked Plaintiffs' Exhibit 15 for identification?

A. Yes, that is the Pioneer-Flintkote brochure on their price list. [132]

Q. Can you point out in the price list the price of 12x12 one-half inch acoustical tile?

A. Yes, that is 10 cents a square foot.

Q. And can you point out the other commonly used sizes of tile there?

(Testimony of Walter R. Waldron.)

A. Well, the 12x12 squares are the most commonly used, and the majority of them is one-half inch thick.

Q. What other thicknesses do you use also as a common matter?

A. Well, three-quarter inch, 12x12 three-quarter inch, would probably be the next step in treatment.

Q. And what is the price of that on this Exhibit 15 for identification?

A. Three-quarter inch 12x12, it is 14 cents a square foot on this exhibit.

Mr. Ackerson: I will offer this at this time.

Mr. Black: No objection.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit No. 15 for identification was received in evidence.)

Q. (By Mr. Ackerson): Mr. Waldron, being in the sales end of the acoustical tile for so many years, do you have personal knowledge as to the prices charged by the other manufacturers for AMA approved tile of those sizes? [133]

A. Yes, they are parallel and equal to this price list.

Q. By that you mean identical or similar or what? A. Yes, I am sure they are that way.

Q. In other words, one-half inch tile is 10 cents a square foot?

A. In my experience with other companies, that is what happens, yes.

(Testimony of Walter R. Waldron.)

Q. And the other is 14 cents a square foot?

A. Yes, I believe that is right.

Q. What price per foot did you have to pay from these lumber yards and acoustical tile contractors after you were terminated?

A. Well, the best we could do was 15 per cent more and occasionally 25 per cent more on each variety.

Q. Can you recall those two orders of tile you purchased from the Louis A. Downer Company?

A. Only vaguely. I don't have the amounts or sizes in mind.

(Exhibiting documents to counsel.)

Q. (By Mr. Ackerson): Do you recall, Mr. Waldron, what percentage—or did I ask you if you recalled what percentage that you paid more than you would have paid had you purchased the tile from Flintkote or directly from a manufacturer—I am referring to the Louis A. Downer [134] purchase?

A. Yes, I think that was in the neighborhood of 25 per cent or perhaps 30 per cent. [135]

Q. Now, during the time you were with the R. W. Downer Company, Mr. Waldron, can you estimate the approximate amount of tile you were able to sell for that company per month?

A. Yes, I would say it would average around 40,000 feet a month of 1½-inch units.

Q. That would be not quite a carload, would it?

A. No, there were times when a month would be

(Testimony of Walter R. Waldron.)

two carloads. But perhaps it would settle off later. I am referring to what I can estimate it being a yearly average.

Q. I see. What was your monthly earnings at R. W. Downer Company, approximately? I realize you don't have records on it.

A. I think the last check I got with them was around $1,500.00. But I don't know the average throughout the year, but it would be probably around eight hundred to twelve hundred, somewhere in there.

Q. Somewhere between eight and twelve hundred? A. I believe it would be.

Q. That was the amount of money you were making prior to going into business yourself?

A. Yes.

Q. After your supply was terminated, were you able to continue doing business with your established general contractors in this area? [136]

A. Oh, no, their volumes were too great for us and we had no assurance of being able to supply a job.

Q. Can you explain that statement? I mean, why didn't you have any assurance of a supply? You were able to buy acoustical tile at enhanced prices, were you not?

A. The bids, the bidding was difficult. Our markup, by the time we paid the 15 to 25 per cent, we would lose the job, because we were overpriced. That happened.

And then we couldn't be sure through the lum-

(Testimony of Walter R. Waldron.)

ber yards of getting proper sizes of tile or proper delivery at that time.

Q. Could you be assured at the lumber yards or the other acoustical tile contractors, that they could or would supply the amount necessary for any substantial job, the amount required on a substantial job? A. The other acoustical contractors——

Q. You mentioned Louie A. Downer Company as one supply you had. And then referring to Louie A. Downer Company, could you depend on him to be there with the tile when the job was ready?

A. No, not completely. He cooperated with us as best he could. But he had only a 12x12 tile, I believe, at that time. And most of the market jobs we were working in and wanted to work in with people we had been doing business were 24x24, and he couldn't supply that one at all. [137]

Q. Well, let's take the lumber yards, do they carry stock on hands at all times——

A. Very little.

Q. ——sufficient to do a sizeable job?

A. No, no, that would have to be arranged months ahead.

Q. Well now, let me ask you this further question, Mr. Waldron: When you, aabeta co., as a subcontractor takes a subcontract from the general contractor, is it the ordinary thing that you are bonded under a completion bond on such a job as that?

A. No, rarely do we have a completion bond. However, we have a contract that is virtually the same.

(Testimony of Walter R. Waldron.)

If we can't perform they will call in other people and backcharge us for it. That is in all of the contracts.

Q. That is in your subcontract with the general contractor? A. Yes.

Mr. Ackerson: If your Honor please, I find it a little difficult to proceed further at this time without disposing of this legal question which has been posed to the court.

I am wondering if Mr. Black would like to proceed on cross-examination thus far, with the idea we can make whatever arrangements——

The Court: I note that you have stayed away from the [138] type of question which Mr. Black considers objectionable.

I said I didn't require you to do that. We are going to proceed and the jury has been told if evidence is stricken they are not to regard it. If you think we had better dispose of the issue, we will give the jury a recess now.

Mr. Ackerson: I think both sides should be in a position to give their views freely, without regard to the jury being present. I am not speaking for myself any more than Mr. Black. I think that would be probably the most expeditious way of doing it.

The Court: Under the circumstances, the jury will retire to the jury room and remain there until we send for you. [139]

(The following proceedings were had in open court outside the presence of the jury:)

(Testimony of Walter R. Waldron.)

Mr. Black. I am really sorry, your Honor, about this trial brief matter. I perhaps had gotten the impression that it was integrated with the pretrial order to the extent that we would have been glad to do it if we realized the court wanted it. We assumed, perhaps unfortunately, that the instructions and the authorities covered the situation.

We will be glad to file a brief if the court wants us to do so over the week end.

The Court: We have gone so far in the case now we probably can do as well without having a trial brief, because you could not get it in before the case is over.

Mr. Black: We could get it in over the week end.

The Court: Then you would have to work Saturday and Sunday.

Mr. Black: That is all right.

Mr. Ackerson: I think I am going to have to anyway, but I would like to go along and argue the matter. I do have some authorities but they are along the line of the general principle line. I think those matters can be disposed of on general principles.

Mr. Black: I think so.

The Court: You are both in default under a local rule requiring you to file briefs. The court accordingly hasn't [140] read what you probably would have liked to have the judge read so that I can pass on many of these issues. You may file a brief if you wish, but since we have come this far you do not have to unless you want to.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Very well. Perhaps then the way to proceed here, Mr. Black, is for me to probably state the documents that are coming up, if that is agreeable with you.

Mr. Black: Let us do it that way, then.

Mr. Ackerson: First of all, your Honor, there is this question—and this is the basic question Mr. Black has in mind—I have alleged as the purpose, design and effect of this conspiracy, protection and continuation of this monopoly of installation among the acoustical tile co-conspirators. Basically in its simplest form the complaint alleges that these people did have a monopoly, that they were fixing prices and they were allocating bids among themselves, irrespective of Flintkote's personal knowledge of every detail of this precise existing conspiracy, the basic thing that Flintkote did of course was to come in after being told to, to come in and agree to eliminate this competition that was wrecking the plan.

Now this evidence relates to what those contractors were doing, and therefore the motive and purpose, the real motive and purpose of Flintkote in aiding and abetting—and I say joining the plan—the evidence I think will show that [141] Flintkote, and I think it has shown, had three established dealers among this group. In other words that was its total output of Flintkote acoustical tile in this area.

Therefore when someone like Gus Crause, somebody from the other Flintkote dealer, and Mr. How-

(Testimony of Walter R. Waldron.)

ard, a third Flintkote dealer, comes in and says, "You quit selling tile to these people or we are going to boycott you," which the evidence will show, Flintkote had a choice of either joining in this plan or else in letting our clients continue in business.

Now all this evidence—we have evidence here from the Downer Company that matches in with evidence we will produce later—showing exactly the exorbitant prices of acoustical tile, in other words, the incentive and purpose, the allocation of the acoustical tile bids to the members who were benefited by the scheme, and we have to introduce yet unit prices which were in vogue at the beginning of this contractors' conspiracy, again showing agreed prices to be charged by acoustical tile contractors in this area.

I think that when we get all of these in they will show identical unit prices to be charged by every contractor.

These what they call take-off sheets, your Honor, shows—and I might show you an example of one—it shows the allocation in longhand writing, which I think can be identified in nearly all cases, it shows the competitor's bid and who is supposed to get the job, and it has in red ink over [142] here signed by Mr. Arnett of the Downer Company, who is the general sales manager, it has "PTA bid," and we can prove that that was to the contractor who got the job. It happened to be Howard in this case.

Howard's records will show his bid was $5745, plus some incidentals, the Downer Company's bid

(Testimony of Walter R. Waldron.)

was ordered by Arnett to be quoted at $6228, and comparatively higher prices down the line.

The documents will show that because the evidence will show that you can't submit a bid without taking a take-off, you have to know how many square feet you put into a job, you have to figure in overhead, you have to figure in sales commission—and we would present naturally a properly filled out and regularly bona fide take-off sheet.

Mr. Black objects to that, I assume, because these defendants are no longer defendants, and I assume that were they still in the complaint his objection would probably be, well, it isn't admissible until you show that Flintkote had knowledge.

Now my answer to that is that it can be done either way, but I think it is also an equally recognized principle that Flintkote didn't have to have knowledge of any more than the fact that they were co-operating with these contractors for the purpose of eliminating my client's competition.

Now I believe that it is almost axiomatic that a co-conspirator [143] in order to be bound by the acts of the other co-conspirators doesn't need to know anything in detail about it. All he needs to know is the ultimate effect, design and purpose of an illegal act. And I think that that type of evidence——

The Court: He has to know that there was a conspiracy and what its general purpose was——

Mr. Ackerson: That is right.

The Court: ——and he needs to be in that conspiracy, and when he is then he is bound by the acts

(Testimony of Walter R. Waldron.)

of the other conspirators even if he never learns of what those specific acts were.

Mr. Ackerson: That is true. And we say the illegal act here was the urging by these other co-conspirators to put these clients of mine out of business because they didn't want that competition.

Now on the face of it, your Honor——

The Court: And it is Mr. Black's theory that the acts of persons who are not conspirators are not admissible, or the acts of conspirators are not admissible until it is shown that his client is a member of the conspiracy.

Mr. Black: That is precisely it in a nutshell, if the court please.

The Court: I think that is true, but you have the practical rule or situation here that conspiracy cases just [144] cannot be proved ordinarily by one witness.

Mr. Ackerson: Or by one line of testimony.

Mr. Black: That is also correct.

The Court: So the courts have generally said that if the plaintiff in a conspiracy case assures the court that it is going to round out by a series of witnesses that the particular matter being inquired into was being done pursuant to an established conspiracy, and is going to connect the particular defendant on trial to that conspiracy by the whole of his evidence, then court admits the evidence offered, if it be evidence, which tends to show an overt act by some one of the conspirators, and will strike the evidence at the close of the plaintiffs'

(Testimony of Walter R. Waldron.)

case, or will strike such of it as has been shown to not be the act of a conspirator, or will strike it all if it is not shown that the defendant on trial is a member of that particular specific [145] conspiracy.

Mr. Ackerson: Yes. And I assume it goes without saying that if there is an understanding on the part of the Flintkote Company that, or, at least an understanding of at least a part of the illegal activities of this original conspiracy at the time Flintkote joined, if it is shown it did join as your Honor says, I don't assume that your Honor's remarks would require my assurance they knew about every weekly meeting the contractors held or the contents of these take-off, alleged take-off sheets.

The Court: No. Your assurance is that you are prosecuting this case with a good faith feeling——

Mr. Ackerson: Yes.

The Court: ——you will link up this defendant to the conspiracy.

Mr. Ackerson: Yes.

The Court: You don't have to assure me you are going to connect or bring knowledge of every particular act to his attention.

There are a lot of times in conspiracies in which one conspirator will say that he goes along with a purpose, but he doesn't want to know certain details.

Mr. Ackerson: I have an idea that Flintkote wasn't anxious to know all these details, but they did know.

(Testimony of Walter R. Waldron.)

The Court: He might even disapprove of certain specific details, but if he gives his approval to the end object of [146] the conspiracy, then he has to accept responsibility for any detail that occurs in the furtherance of that conspiracy by any of his fellow conspirators.

Mr. Ackerson: That is my point. And I think, as a bare minimum, your Honor, I can show a general knowledge of the distribution of the end conspiracy. Whether this bid allocating scheme was in their knowledge or not, I don't think is important.

I think Flintkote can be shown to know there were only so many limited sources of supply. They obviously knew those limited sources of supply were distributed among the other co-conspirators. And I think prima facie it has been shown now, in the absence of a different explanation—something that hasn't been in the record yet—I think it is obvious right now that a prima facie case has been made of knowledge of the illegal cooperative aid they gave the contractors in cutting this client off. I think that is the least that I can assure your Honor.

The Court: What is your objection to our proceeding that way? Or do you think that I misconceive the basic law of conspiracy?

Mr. Black: No, I don't think——

The Court: Perhaps before I hear you we had better take up this ex parte matter. There is an attorney who has been sitting here since shortly after we convened, whose only business, [147] as

(Testimony of Walter R. Waldron.)

I understand it, is to move the admission of a new member of the bar of this court. We will hear that motion.

(Other court matter.)

The Court: Now, we will hear you, Mr. Black.

Mr. Black: The court please, I don't think there is any wide departure between us at all on the basic results. Your Honor is familiar, of course, with the case of Thomas v. United States, where, I think, in three sentences the court has summed up more tersely than any other place——

The Court: If it has ever been summed in three sentences I would like to hear it.

Mr. Black: It is 57 Fed. (2d) 1039. It is a most concise statement.

The Court: All right.

Mr. Black: At page 1041 the court says:

"To render evidence of the facts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."

The second sentence is, "Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy.

"The existence of the conspiracy charged [148] cannot be established against an alleged conspirator by evidence of the acts or declarations of his

(Testimony of Walter R. Waldron.)

alleged co-conspirator done or made in his absence."

That, of course, is basic, in general.

The Court: It speaks as of the appraisal of the case when all the evidence is being weighed.

Mr. Black: That is correct. And I think that every case, where they have, for convenience—and I agree they have done so many times—on these very complicated antitrust cases, where they have varied the normal order of proof the court in every instance recognizes that that practice is done purely as a matter of convenience and is a departure from the normal order of proof, which is first to show your connection with the defendant before you are entitled to bring in a whole lot of evidence that other people may have done, because, as your Honor can well appreciate, that evidence might be highly prejudicial, establishing perhaps that very unfair and illegal acts are being done by a lot of other people.

The jury in some way might easily get the notion that the defendant, because he is charged with being in this, is therefore tied in to all these acts and has approved and given them his blessing.

I recognize that where you have 30 or 40 defendants, as [149] you often do in these big antitrust cases, with an innumerable number of conspirators, and particularly if it is tried to the court, that you are almost confronted with the necessity of departing from the normal procedure, first showing

(Testimony of Walter R. Waldron.)

the connection of each defendant with the thing, before the evidence is admissible against him.

Here we are dealing with a jury case. Here we are dealing with a single defendant.

The Court: But we have more than the single defendant or we don't have conspiracy.

Mr. Black: Right.

The Court: And if this conspiracy is proved, as it is alleged, we have many conspirators.

Mr. Black: That is perfectly true.

The Court: Isn't the plaintiff entitled to show the existence of a multi-party to the conspiracy?

Mr. Black: Of course, he is. But our position is that, under the normal court procedure, the rules laid down by the substantive law, and is recognized by Justice Jackson in a case I will quote you in a moment, the connection of the defendant should first be established before the evidence of the other acts come in. And to reverse that order is to prejudice or to possibly prejudice a defendant.

All we are asking in this case is that before evidence of the takeoff sheets, or whatever else he has, that the [150] other people may have done be brought in, that competent evidence first be produced to connect Flintkote Company in some way with the conspiracy.

We submit it is not enough merely to show that dealers came and complained about these plaintiffs being in the business, because that principle has been squarely decided most emphatically by the

(Testimony of Walter R. Waldron.)

case of Johnson v. Yost. That is an Eighth Circuit case. It is 117 Fed. (2d) 53. It is practically on all fours with the instant case.

The plaintiff Johnson there was a cut-rate lumber dealer. The defendants were of two classes. Other retailers in lumber, like the contractors in this case. And the second, suppliers of building materials.

The plaintiff alleged that the retail defendants had conspired together in restraint of trade to destroy plaintiffs' business by cutting off his source of supply through persuasion, coercion and threats of boycott against the supplier defendants.

The plaintiff further claimed that the supplier defendants became parties of the conspiracy by refusing to sell the plaintiff in interstate commerce.

The verdict was directed in the trial court in favor of all defendants and a judgment of dismissal of the action was entered.

The plaintiff appealed. The Court of Appeals for the [151] Eighth Circuit found that certain evidence had been improperly excluded as respects the retailers, and it reversed the trial court as to the retailer defendants, and remanded the case, but it sustained the judgment of dismissal against the suppliers, and the court in that connection says:

"In the final analysis, the claim is that these defendants were coerced by defendant dealers, and as a result of that coercion they declined to sell plaintiffs. From this plaintiffs conclude that a conspiracy existed between all of the defendants. It

(Testimony of Walter R. Waldron.)

must be borne in mind that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause or for no cause whatever.

"The combination and conspiracy charged against the lumber dealers was a combination to deflect the natural course of trade. Such a combination is not only an unlawful invasion of the rights of the parties at whom the concert of action is aimed, but also of the parties who are to be coerced into refusing business relations with them. Assuming that plaintiffs were customers of the supplier defendants, the combination of the lumber dealers was directed to preventing plaintiffs from having business relations [152] with the supplier defendants. This combination prevented these defendants from selecting their own customers. The decisions of the Supreme Court abound in expressions to the effect that 'The trader or manufacturer, on the other hand, carries on an entirely private business and may sell to whom he pleases.' From the mere fact of refusing to sell to plaintiffs, there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers * * *

"There is here no substantial evidence introduced or proffered that these defendants have gone beyond the simple refusal to sell their goods for reasons which were sufficient to them and which appeal to one as having substantial basis in reason.

(Testimony of Walter R. Waldron.)

While their acts in refusing to sell were similar, yet a fair and logical inference from the evidence is that as pressure was brought to bear on them, they from business necessity and self-interest declined to sell plaintiffs. As to some of these defendants there were other reasonable explanations, but liability on their part could only result from a knowing participation in the combination of retail dealers. It was not enough to establish a cause of action against them to show that there [153] was a conspiracy among the lumber dealers to prevent plaintiffs from securing supplies sold by this group of defendants, in the absence of evidence that these defendants knew there was such a conspiracy. They refused to sell plaintiffs because they feared such act would displease their other customers, causing loss of their business. They perhaps knew that other suppliers were refusing presumably for like reasons * * *

"So here, the refusal of the supplier defendants to sell to the plaintiffs may have furthered the object of the conspiracy charged, but it did not prove that the suppliers knew of the conspiracy."

That is precisely the position, I think, our client is in in this situation. If it is proved these people came to us and complained, and even if it is proved, which we challenge and deny, that we yielded to that pressure and not from our own business motive, that still wouldn't be enough to tie this defendant into that conspiracy.

The case I referred to on the matter of the order

(Testimony of Walter R. Waldron.)

of proof—it is Mr. Justice Jackson's statement, and the concurring statement in Krulewitch v. United States, 336 U.S. 440. 69 Supreme Court 716, where it says strictly that, "The prosecution should first establish prima facie the [154] conspiracy and identify the conspirators, after which evidence of acts and declarations of each, in the course of its execution, are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or ever known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy [155] existed."

Now that is the difficulty of adopting the rule of convenience which Judge Medina has done, and very many other Federal judges have of course done. We concede that it has been done in these antitrust cases, but we submit they are done where there is a great complexity in the case and where it is obviously practically impossible as a matter of mechanics to proceed any other way.

Now all we are asking in this situation is that the connection of this defendant with the combination or unlawful conspiracy be first established before any other evidence of what other conspir-

(Testimony of Walter R. Waldron.)

ators have done or what they may have said be admitted.

The Court: Mr. Ackerson, what evidence are you going to have connecting this particular defendant with the conspiracy you have alleged?

Mr. Ackerson: May I just review briefly what is already in the record——

The Court: I wish you would just answer that question.

Mr. Ackerson: Yes, that is all I am going to do.

The Court: All right.

Mr. Ackerson: So far we have shown that the Flintkote—let me make this distinction, your Honor.

I believe Mr. Black was talking about a case where a manufacturer or manufacturers acting individually refused to sell a plaintiff. That isn't the case here. This case is [156] mere refusal to sell, this case is a case where The Flintkote Company did sell, it is admitted. They investigated. They sold. The case revolves around the thing why did they refuse to continue to sell. What is the purpose of doing that?

The Court: Is continuance of sale any different legally than starting to sell?

Mr. Ackerson: It gets back, your Honor——

Mr. Black: Mr. Ackerson, you have your facts wrong. They had been dealing with these people and they did cut them off.

Mr. Ackerson: The Johnson case, I thought I

(Testimony of Walter R. Waldron.)

heard you read, said there was no substantial evidence proffered or received.

I say this evidence here is relevant to the only defense that I understand you have, Mr. Black, and that is, what was our purpose in cutting them off. If we show it was an illegal purpose, in concert with one or more of these very contractors, that is our theory. If you can show, as you stated, that your purpose was merely independent business judgment, wholly disassociated from any pressure or knowledge of your contractors' acts, that is another thing.

But I say, and I believe the cases bear me out, your Honor, that you can always introduce evidence as to purpose and design.

The Court: Are you contending that the yielding to [157] pressure makes the one who yields a party to the conspiracy?

Mr. Ackerson: If he knows the illegal design and if I can prove it.

The Court: And is that going to be your evidence of connection of this defendant to the conspiracy?

Mr. Ackerson: Yes, that plus other knowledge, your Honor, that they knew the design.

The Court: What other knowledge are you going to bring home to this particular defendant? And is that going to be your evidence of connection of this defendant to the conspiracy? [158]

Mr. Ackerson: Yes. That plus other knowledge, your Honor, that they knew the design.

(Testimony of Walter R. Waldron.)

The Court: What other knowledge are you going to bring home to this particular defendant?

Mr. Ackerson: Well, this defendant, the knowledge that I have already stated, that this defendant knew the setup, he knew the effect of the setup, and when he was asked to help and obeyed and, I say, joined the setup by eliminating the only competition in the field, unless he can show that he didn't know anything about it, that he wasn't helping these contractors at all, it is my theory that he joined the conspiracy.

The Court: The court finds that the complexities of the case now on trial are such, the involvement of the alleged parties to the alleged conspiracy is such, that it is necessary to invoke the rule of convenience, as you have referred to it, Mr. Black, and to allow the evidence of acts and declarations of other alleged conspirators to be admitted into evidence, subject to a motion to strike.

I do not know just what the outcome will be when a motion is made to dismiss at the conclusion of the plaintiffs' case, which I assume will be, on the question of joining a conspiracy because of compulsion, if the compulsion is shown to be in the form of pressure from the Association, pressure from other vendors. That would be evidence, I take it, [159] circumstantial evidence, or offered as circumstantial evidence, of the joining of a conspiracy, but you are going to have to have enough, Mr. Ackerson, that the resonable inference to be drawn from all the facts is that it was a yielding to the

(Testimony of Walter R. Waldron.)

combine and becoming a member of it, otherwise we will have to, in the language of the street, throw your case out.

Mr. Ackerson: I realize that.

The Court: But for the present we will follow the rule of convenience and admit the testimony.

Now I haven't heard anything yet which would indicate a court's duty to depart from the rule that admissions of a conspirator, one conspirator made in the course of a conspiracy and in furtherance of it, are admissible against and binding upon the fellow-conspirators. The rule I refer to is the one that holds that in order to be in furtherance of a conspiracy, the act or declaration must be one which was made in the course of the conspiracy and not afterwards. I think that the date of the conspiracy ended as the closing date for the making of admissible admissions binding on other conspirators—it is certainly binding upon the person who makes them—but as to their being in furtherance of a conspiracy they can't very well further it after it is ended. And I think if your February 19, 1952, date of ending is the date which forecloses the admissions of persons other than the firm on trial and its own direct agents acting for it rather than acting [160] for it as a conspirator——

Mr. Ackerson: Very well, your Honor.

The Court: ——so if you have some holding of a court on that express question, I will reopen the ruling, but unless you do have, I will not admit testimony of the type just alluded to.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Statements or acts subsequent to the termination date of the conspiracy, February 19th?

The Court: Yes. That statements or acts of persons other than the defendant on trial, and its agents, that is, the agents of Flintkote, Flintkote a corporation rather than Flintkote a conspiracy.

Mr. Ackerson: Yes.

The Court: Because every conspirator is an agent of the other conspirators for the purpose of furthering the conspiracy. They even apply that in criminal law so far that if you and I were to conspire to rob the reporter here, and we say we will perhaps rough him up a little but no firearms, and then I get improvident and take a gun and shoot him, and that being in furtherance of the conspiracy to get his wallet, they will hang you for it.

Mr. Ackerson: I realize that.

I think our Ninth Circuit decisions, probably those old bootleg cases, went further along that line of joining a conspiracy, responsibility for the conspiracy, than most other [161] cases did. I know I read many, many of them before.

The Court: The various treatments of sale of alcohol at times when it was prohibited as a beverage have led to a modification of conspiracy laws and criminal laws throughout the nation and the state generally.

I found in connection with an entirely different type of case than in connection with the Volstead Act, that no state would prosecute a person for

(Testimony of Walter R. Waldron.)

the exact state of facts that the federal government prosecuted for, because they felt that the rule against double jeopardy prohibited it.

Then New York had a state prohibition law similar to that of the nation and they took to prosecuting people, waiting for them with the sheriff as they were released from a federal institution, prosecuting them all over again for the same pint of whiskey, or possession of it.

Someone who had more than a pint carried the matter up to the Supreme Court and the Supreme Court said that that is not double jeopardy because you are being prosecuted by an entirely different entity than the United States, you are being prosecuted by an individual state, and so the doctrine prohibiting double jeopardy, at least in its common concept of the people, and I am reasonably sure of those who wrote it into the Constitution, was stultified. But the legislature of New York was shocked by it and they threw out their prohibition law, so for many years there was no prohibition [162] law in New York although the Volstead Act stayed on the books.

But that is not our case. It is just an aside from the issues of our case, but I simply mention it because you made some reference to the liquor laws as having brought forth a considerable modification of the laws of conspiracy. I agree. I think it was a modification of every law.

Mr. Ackerson: I have often thought that the

(Testimony of Walter R. Waldron.)

federal fraud statutes are sort of a form of double jeopardy. They can indict you for conspiracy and ten substantive counts for every overt act that they took into the conspiracy. I don't know whether that was intended when it was passed or not, but I guess it was because they revised it fairly recently.

The Court: I think we ought to take a little recess for court and counsel.

Mr. Black: There is one other point, if the court please, that I think is very briefly stated, and that point of difference has arisen in connection with some of this damage testimony.

It is our position that the law is just settled beyond peradventure that in the treble damage cases, damage only up to the time of the filing of the complaint is recoverable.

The Court: Is there any contention otherwise?

Mr. Black: I don't know, but I think there is.

Mr. Ackerson: Yes. I would like to submit a memorandum on that, on certain types of [163] damages.

The Court: Don't you have to file a supplemental complaint?

Mr. Ackerson: That is a simpler way to do it, but I don't think you have to.

Mr. Black: You must indeed because the cases hold that in order to get damages beyond the time of the filing of the complaint treble, you have to show that the conspiracy continued and that every other element in the case continued.

The Court: Can they get them once on the orig-

(Testimony of Walter R. Waldron.)

inal complaint? Can they get damages up to the time of trial?

Mr. Black: Up to the time of trial.

The Court: But not treble?

Mr. Black: No.

The Court: That is one matter I would appreciate having a memorandum on.

Mr. Black: Very well. We will brief that point.

The Court: I think that would be better than to go ahead with the whole trial brief.

Mr. Ackerson: I will do that over the week end, and I am sure Mr. Black will also.

The Court: Let us recess for about 10 or 15 minutes.

(Short recess.) [164]

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Members of the jury, we disposed of the particular legal issues. There is no need now to tell you about them. But it might be well, as it is in the course of a case which is not of the everyday variety, to point out to you a couple of the rules of law in connection with it, although you will be fully instructed at the close of the case, and that is the time when the instructions generally are given.

It is the law that a manufacturer can select whom he wants to sell to. You go down the street to one of the restaurants in town and go in. They come under the law of innkeepers and have to serve you.

You go up to the Santa Fe and ask to buy a ticket to Chicago. They have got to serve you because they are common carriers.

You go to Flintkote Corporation and say, "I want to buy some tile."

They can say, "I don't like the way you comb your hair. I won't sell it to you," and they are entirely within their rights.

What these antitrust laws prohibit is a conspiracy in restraint of trade. That is what is on trial here. Unless these plaintiffs can show there was a combination and [165] conspiracy which damaged the plaintiffs, and the conspiracy was a particular type which will be described in the instructions at the conclusion of the case, then you will have to find for the defendant.

If you find the plaintiffs were injured, damaged in a money way by the conspiracy, then it goes otherwise.

Now, a conspiracy, generally speaking, is a combination of two or more persons or corporations for the purpose of accomplishing an illegal act or for the purpose of accomplishing a legal act in an unlawful way.

Conspiracy arises from an agreement, but it is not the agreement itself. Marriage arises from an agreement, but it is not the agreement itself.

The conspiracy is the combination which arises from the agreement, and the agreement can be informal or it may be formal. It can be implied from acts, circumstances, if they are clear and definite and compel that conclusion, or they might sit down

and write it up. But if it is an illegal purpose which is sought to be accomplished, it is very unlikely it would be written up, anyway.

Now, Counsel, does that statement——

Mr. Black: I think something should be said about the necessity of showing that the defendant in some way was connected with it.

The Court: Yes. We are, of course, not giving the full [166] instructions at this time, but these little interim comments I have found to be useful in cases of this kind and generally are given by the members of the court.

Now, a conspiracy is only important here if this defendant be shown to be one of the conspirators. There might be a conspiracy which does no end of damage to a particular individual, but it is the members of that conspiracy who are responsible to it, and not persons or firms that are not in the conspiracy.

If this defendant, acting individually for its own purposes, regardless of whether they were laudable or not, decided not to sell to the plaintiffs, then the plaintiffs just have to live with that fact, unless they have a contract. The plaintiffs aren't suing here for breach of contract.

So it is going to be necessary for the plaintiffs, either by direct or circumstantial evidence, to establish evidence which establishes, by a preponderance of the evidence, that the defendant on trial, The Flintkote Corporation, was a member of a conspiracy and that the conspiracy was the type that is

charged in the Complaint, and that these plaintiffs suffered damages as a result.

Now, have I stated only as to one side of the [167] coin?

Mr. Ackerson: I am satisfied, your Honor.

Mr. Black: That is satisfactory, your Honor.

The Court: Proceed with the evidence.

WALTER R. WALDRON

having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Waldron—first, may I have this marked for identification?

The Clerk: Plaintiffs' Exhibit 16 for identification.

(The exhibit referred to was marked Plaintiffs' Exhibit No. 16 for identification.)

(Exhibiting document to counsel.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 16 for identification and ask you if you can identify that document.

A. Yes. That is a financial statement brought up for the first six months of our operation in 1952.

Q. Does that financial statement involve this one carload of acoustical tile which you got from Flintkote? A. Yes, that is it completely.

(Testimony of Walter R. Waldron.)

Q. Does it involve any other matters that you can see at this time? [168]

A. No, this is just the results of that.

Q. Of that carload of acoustical tile?

A. Yes.

Mr. Ackerson: I will offer it.

The Court: Received.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 16.)

Q. (By Mr. Ackerson): Mr. Waldron, did you ever attend a meeting of these acoustical tile contractors in this area? A. Yes.

Q. When was that? A. That was in 1950.

Q. Who were you employed by at that time, Mr. Waldron? A. Coast Insulating Products.

Q. Did you attend that meeting as a representative of Coast? A. Yes, in a sales capacity.

Q. Who told you to attend the meeting, if you were told?

A. Yes, I was asked to attend by Mr. Newport, an owner of the firm.

Q. And can you state where that meeting was held?

A. Yes, that was held at Rodger Young—I think they called it Auditorium—however, it is a cafe, on Washington [169] Street, I believe, in Los Angeles.

Q. I wonder if you can describe what happened there and by that I mean what was said and what was done.

(Testimony of Walter R. Waldron.)

A. Well, the reason for the meeting was to clarify the use of quantity survey service that was headed by—I can't remember the man's name at the moment.

Q. Was it Mr. Hollenbeck, or some such name?

A. Mr. Hollenbeck, that is correct.

Q. Can you explain what a quantity survey is?

A. Yes. The acoustical contractors at that time were submitting their estimates of any one job to this individual for quantity survey, in other words, the amount of square footage that was to be on any one job as a take-off, as each contractor saw it. Now the ruling there was——

Q. Let me get this straight in my own mind, Mr. Waldron. Where did the quantity survey come in? Was that these take-off sheets?

A. Yes. Those are take-off estimates of a blueprint.

Q. And what did Mr. Hollenbeck do with them? Were they submitted to him?

A. Yes, he received them by mail and delivery and they were opened in his office without any of the contractors present, and it was his duty to decide who had the least amount of acoustical tile on a job and——

Q. On a job or on a bid? [170]

A. Well, in this case, it was the job represented there by the take-off. This was not a bid. The bid would be handled by the contractors themselves after this survey was taken place.

(Testimony of Walter R. Waldron.)

Q. Let me interrupt you again. I don't know whether I am following you.

These various contractors, I take it, would take a take-off sheet, the amount of material they felt would be needed to install the acoustical tile, for instance, in this room—— A. That is correct.

Q. ——and then that take-off sheet would be submitted to Mr. Hollenbeck? A. Yes.

Q. What for, checking, or what? Did he check for accuracy or what? I don't understand what Mr. Hollenbeck did yet.

A. In principle, it was inaccuracy. However, he was to decide the low man, or the least amount of acoustical tile that showed on their take-offs. Am I clear there?

Q. In other words, he would decide which contractor had submitted the take-off sheet requiring the least amount of tile to go into the job, is that it?

A. Yes, And he in turn was instructed that that man would be dropped from the bidding list and the next man in line would be instructed to take the job. [171]

Q. Now, the——

Mr. Black: If the court please, may it be understood that all of this testimony is subject to our motion to strike, or would the court prefer that we object to each question at the time? I want to keep our record straight.

The Court: I understand that testimony of this type is subject to a motion to strike.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I think that is the only convenient way to do it, your Honor.

Q. Now, at this meeting at the address you gave, can you tell us what happened when you came in, how it proceeded? A. Yes.

Q. And how it broke up?

A. Yes. That was a dinner in the early evening and after dinner there was discussion on methods of approach to a set of plans.

Q. What kind of a set of plans?

A. Construction, architectural portion of the work, architectural acoustics.

Q. Was that in the nature of how to make a proper take-off?

A. That is right, to try to be a little more accurate in take-off methods.

Q. Was that a general discussion or did someone lead it? [172]

A. It was led by Howard Smith of the Schugart Company. He was leading the take-off methods at the moment.

However, there were questions of how this price, maximum price list, would prevail there, and there were comments made——

Q. I haven't asked about a maximum price list, Mr. Waldron. I realize you are trying to answer the prior question.

I will interrupt you and ask to have this marked as Plaintiffs' Exhibit next in order.

The Clerk: Plaintiff's Exhibit 17 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked as Plaintiffs' Exhibit No. 17 for identification.)

Q. (By Mr. Ackerson): Now I show you Plaintiffs' Exhibit 17 for identification, Mr. Waldron, and ask you if that is the price list, or if that is the type of price list you mentioned in your testimony.

A. Yes, this is a type of one that was used during a period there. I didn't have this particular one at that time.

Q. Did the list change, I mean you knew about Coast Insulating at that time, I suppose?

A. Yes.

Q. Did Coast Insulating change from time to time thereafter? [173]

A. No, they held onto that for some time, and then the acoustical contractors organization was set up and the minimum price list was dropped and then allocation through meetings was arranged.

Q. But this same price list, the same prices, is it your recollection that they continued on until the formation of the Acoustical Association?

A. Yes, they tried to hold to that particular type of minimum bid.

Mr. Black: That is objected to as a conclusion of the witness.

The Court: They tried to hold to that is a conclusion of the witness and it is stricken.

Whenever any evidence is stricken, the jury should disregard it.

Q. (By Mr. Ackerson): Can you state whether or not the prices listed on this Plaintiff's Exhibit 17

(Testimony of Walter R. Waldron.)

for identification were adhered during the period from this meeting in 1950 up until the Acoustical Contractors Association was organized formally?

A. This particular type was. I use one. I see this one was revised July, 1951, and to cancel all previous ones, but I had one myself, and the prices appear to be pretty close if not the same as the one I used at this meeting in 1950. [174]

Mr. Ackerson: Very well. I will identify this at later date, Mr. Black.

The Court: Should it not be given a number for identification?

Mr. Ackerson: It has a number; it is No. 17, your Honor.

A Juror: May I ask a question?

The Court: Yes.

A Juror: This room was given as an example. Do I understand that would give the take-off that each man should give the amount of footage that would be required to be used in this given room, and are they encouraging that the one that gives the lowest amount of footage will not be accepted? In other words, to encourage the contractors to figure more on a job?

The Witness: Am I to answer that?

The Court: Unless there is an objection, you can answer it.

The Witness: That is correct.

Q. (By Mr. Ackerson): Now did you attend any other meetings other than this one, Mr. Waldron? A. No, I didn't attend any more.

(Testimony of Walter R. Waldron.)

Q. Do you know of your own knowledge whether anyone else connected with Coast—that was the firm you were working for at that time? [175]

A. Yes.

Q. Do you know of your own knowledge—I don't mean by hearsay or rumor—whether or not any other representative of Coast attended other meetings? A. Not that I could be sure of.

Q. When did you start working for the Downer Company? A. In the fall of 1950.

Q. The fall of 1950? A. Yes.

Q. And this meeting occurred how much prior to that time?

A. Oh, I am guessing, but I think two or three months.

Q. Now do you have a typical form of take-off sheet that has been completed in your possession?

A. I believe I have in the briefcase over there on the bench.

Q. Can you take out just one, or whatever you need for illustration?

A. Well, any of these, I suppose. These are not large but I think any of them would give you an idea of what is necessary there.

Q. In other words, the only difference would be ordinarily that one would require more materials than others and this happens to be one requiring a small amount?

A. I wonder if you would tell me what date that was in [176] the right-hand corner.

Q. 12/17.

(Testimony of Walter R. Waldron.)

A. That is all right. I won't need that.

Mr. Ackerson: May I have this marked for identification, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 18 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 18 for identification.)

Q. (By Mr. Ackerson): Now you can identify this then as a typical form of take-off sheet that has been filled out and contains the usual data of the take-off sheet in the acoustical tile?

A. Yes, that is complete. It has all of the acoustical tile and the component materials necessary to attach this tile in position, and it has the labor and trucking and tax on materials, and insurance on labor, and then a cost price, a mark-up price, and a bid price. [177-178]

Mr. Ackerson: I would like to offer that at this time. I think you have seen this, Mr. Black.

I will offer this at this time. This is the Plaintiffs' Exhibit 18 for identification.

Mr. Black: We will object to it, subject to our motion to strike as part of the general——

The Court: Received in evidence.

(The document heretofore marked Plaintiffs' Exhibit No. 18 for identification was received in evidence.)

Mr. Ackerson: I wonder if we can staple these on the corner and have them marked for identification under one exhibit number.

(Testimony of Walter R. Waldron.)

The Clerk: Plaintiffs' 19 for identification.

(The documents referred to were jointly marked Plaintiff's Exhibit No. 19 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' 19 for identification and ask you if you can identify these various sheets under that exhibit? I mean identify them.

A. Yes, I recognize the sheets.

Q. Will you state what they are?

A. They are sheets similar to the one the jury has at the moment. However, in the absence of specification and absence of takeoff of room and sizes and thickness of material and the final tally or addition of quantity that [179] would be on this particular job—I see that is a job of A. Sutter Elementary School, Long Beach—and on the back there is an absence of acoustical tile component materials necessary to install acoustical tile, and absence of tax, warehouse costs, cartage, labor, supervision, insurance on labor, or any cost figure or any mark-up figure, other than the one you find at the bottom here, which gives one figure, which over here (indicating) there is an "H" that will—you can identify it. I can later.

Q. Yes. In other words, your statement is there is no date upon this upon which to work up a bid, is that the general gist of your statement?

A. Yes. These figures on the left are of a certain amount, and on the right there is a higher figure that

(Testimony of Walter R. Waldron.)

is written here to "O.K.," signed "R. W. A." which means this is the figure which we had to quote in bidding (indicating) this job, without knowing what we were working on at the beginning of the situation. And later find out, by asking the general contractor that got the job, and find out this figure took the contract (indicating), you see, the lower figure.

Q. I am going into that, Mr. Waldron.

Can you explain where these documents came from?

A. Yes, they came from my briefcase. They are pads that we have to make takeoffs with. [180]

However, in this blank takeoff sheet, I was handed numerous of these things, and was asked why we lost the job and to find out why we lost the job.

That is the general procedure of a general—sales manager, to learn why we lose work in any company.

Q. Were these sheets handed to you by the general sales manager or some member of the staff of Downer?

A. Yes, there were times when Mr. Arnett, this company handed me one or two or three, and then, of course, it was instructions to—his secretary, to see, in his absence, that we would learn why we lost these jobs.

Q. Well, what was ordinarily done with these sheets, Mr. Waldron, when you found out you had lost the job? Were these kept in the files of the company or were you supposed to keep them?

(Testimony of Walter R. Waldron.)

A. No, I kept all of mine. I still do. And although there are times when one of these will come to life again, someone either can't perform or doesn't have time, and there are occasions even in this school bidding—it is very rare, but once in a while something happens and we get another shot at it, so to speak.

Q. How long did you ordinarily, as a personal matter, keep these files after you found that you had lost the job or that Downer Company had lost the job?

A. Well, months, I would say, since a job doesn't go [181] in for six or eight months, on a large job three to eight months and sometimes ten months or a year. So I would keep them, and those I just left in my briefcase after I learned that we weren't in the money on that particular piece of work.

Q. Did you ever return them? You carried most of your equipment of this sort around with you on the job, didn't you, when you were soliciting?

A. Oh, yes.

Q. Did you ordinarily return these documents after you found Downer had lost the job for any official filing with Downer Company? Was that the practice or not? A. No.

Q. In other words, the files that Downer Company had, under a regular filing system with those jobs, in which they were successful in, is that right?

A. Yes.

Q. Now, I would like to call your attention to the longhand writing on the first sheet here relating to

(Testimony of Walter R. Waldron.)

the Sutter School, and ask you if you can identify either of those writings or if there are two writings.

A. I don't know. I identify this as being the initials——

Mr. Black: I am sorry, I didn't hear the answer.

The Witness: Identify the writing as being the initials of Robert Arnett, sales manager of the R. W. Downer Company [182] at that time.

Q. (By Mr. Ackerson): And you are referring to the writing within the red circle and in red print?

A. Yes, these are not—I wouldn't know if these were his figures (indicating), but this is his "R. W. A." initials. I have seen them many times.

Q. What about the "O.K." above the initials?

A. That is right, the "O.K., R. W. A." was in that circle.

Q. Now, I notice some figures in that circle. The figure "$6,228.00, $2,532.00, $1,210.00, $387.00."

Can you tell me what they are? What is the significance of those figures, do you know?

A. That is a carryover of percentage higher than the grouping on the left (indicating), and this is $6,228.00, the top one (indicating).

Consequently these are dollars and they are over the other figures, and the other is $5,745.00; that took the job. We quoted $6,228.00. I say "we." I have—I may have done the phoning myself.

There are times at the last minute—I want to explain one other thing, if I may. On school bids, public works bids, the subcontractors seem to wait—and it is a general practice—until the last hour before

(Testimony of Walter R. Waldron.)

bid time, and then as many as two or three or four people in our office [183] would choose about three or four contractors each, and in some events there are 10 or 12 general contractors bidding on one job, and they throw their bids in right fast at the last minute, so there is no chance, as we feel, of someone picking up our bid at a friendly place and resubmitting it. In other words, they won't have time.

Q. Now, can you explain in any manner how you would arrive at that figure of $6,228.00 and the subsequent figures?

A. I don't know how we arrived at the figure on the left. I can't see any reason that you could ever arrive at any figure there.

Q. You are talking about $5,745.00 and the figures under that column? A. Yes.

Q. Is there any indication on this sheet, Mr. Waldron, of any basis for those figures?

A. Well, they are in sequence. This job, the person who got this job for this amount of money, that we knew about before bid time, which was listed here at 2:00 p.m., April 26, '51.

This bid had to be in to the general, or, the general contractor had to have his bid in by 2:00 o'clock on that day, and all of his subcontractors would have to have their bids in sometime prior, to allow the general to work it up [184] and go on his way and be at this bid opening.

Now, each time we bid a job like this and each time it was before the bid opening, and each time

(Testimony of Walter R. Waldron.)

there is an initial at the upper right-hand corner, and in this case it is "H."

Q. What does "H" mean there, if you know?

A. Well, we learned later, after checking, that this figure was submitted (indicating), and the low bid was the R. E. Howard Company. And after we learned that, this was written down here, who got the job (indicating).

This "H," as the sequence shows through all those things, that the "H" at the top would be Howard and "C" would be Coast, and "Sh" would be Shugart. And there is Denton and their initials are all up there (indicating). Those are there before we ever bid the job.

Q. Do you know who placed them there?

A. Someone in the office of the R. W. Downer Company did these. Now, I don't know just who. I don't recognize the "H."

Q. When they were given to you, they were in this same form, just as we have them here?

A. Yes, and I would ask for the takeoff and they would say, "That is all we have. There is no takeoff."

Q. You would proceed or Downer would proceed to enter the red figures in the red circle? [185]

A. Yes.

Q. Do you have any basis for stating that the pencil figures opposite the red figures were received by Downer Company prior to the actual bid by Downer Company?

A. Yes, that is correct. Their estimating, the

(Testimony of Walter R. Waldron.)

office estimator there, who would check our figures from time to time, or in some cases work up a job himself complete—I believe those are his [186] figures.

Q. Do you know who that was?

A. Mr. Griswold, who has since deceased.

Q. Did anyone else supply figures—do you want to turn over some of the rest of these and see if they all have the same type of handwriting on them or whether you can identify other handwriting?

A. Here is one that I believe is R. W. Arnett.

Q. You are referring to——

A. I don't know which one it is.

Q. The sheet relating to——

A. Well, I don't know which one. These are all attached together. I don't know if this sheet or this one, probably this one is the one.

Q. It is attached to either the sheet relating to the——

A. John Muir Junior High School. That is in Burbank.

Q. Or to the following sheet?

A. Yes. It is a portion of Transit Shed, Long Beach Harbor. That would be the Harbor Commission job. I don't know which one it is. It says John Muir job here. This may be the other one, you see, or a different John Muir. There were several.

Q. Very well. Pass on to the next one then and see if you can identify either the writing on the back of it——

A. This would be, although it isn't initialed, it

(Testimony of Walter R. Waldron.)

would [187] be Mr. Arnett because of the word "quote" which is similar to the one we just looked at.

Q. And by "here" you are referring to the red writing?

A. Yes, there was a condition on this type—this is Howard's; you have all of Howard's—there are several others there, but they called in a figure to our company of a certain amount here and later changed it and raised it, and that is why this one is marked out and a higher figure put just above, that is why this is marked out and a higher figure over here in the mark-up over his figure to assure him of no foul-up, so he would be sure and get the job.

Q. By "he" you mean Howard, I take it?

A. Yes, in this case it is Howard, R. E. Howard, acoustical contractor.

Q. And that with reference to the Long Beach job——

A. Yes, that is a transit shed, Long Beach Harbor.

Q. Now let us pass over to the following one. Would your testimony be the same as to that?

A. Yes, this is the one that had an exact amount to raise it, they were instructed to raise it, or our company was instructed to raise it 9 per cent, which apparently would be roughly that figure.

Q. The difference between $880 and——

Mr. Black: Just one moment, please.

You say your company was instructed. By whom and was [188] that in your presence?

(Testimony of Walter R. Waldron.)

The Witness: This company, Mr. Black, was instructed by—what figure was that?—by the Howard Company, the R. E. Howard Company——

Mr. Black: How do you know that? Were you there?

The Witness: There have been occasions when I was there and Mr. Griswold would be talking to them and I was just looking right there, sitting near him, and on one occasion, the occasion I am referring to, he had to call back because when we bid the job, or Griswold bid the job, he found out that he was low, so he had to really call back and check, and revise his figures, so he wouldn't be below the Howard figure.

There is so much of it that I can't—I don't know—should I take detailed time to go into all of this?

Mr. Ackerson: Mr. Black, you are asking him.

Mr. Black: I was simply suggesting that you answer from your own personal knowledge rather than your impression of things.

The Witness: Yes, I have been there on many occasions and I would scratch my head and wonder why we were doing that sort of thing.

Q. (By Mr. Ackerson): In other words, you had personal knowledge eventually of the system——

A. Oh, yes. [189]

Q. ——that was being used?

A. Yes, because I was losing money. I only lived on commissions at that time, and any time they gave a job away my commissions went out the window.

Q. Now you have noted, have you not, that there

(Testimony of Walter R. Waldron.)

is absolutely no specifications, and so forth, amounts, sales tax, warehousing, cartage or anything on these pages? A. Yes.

Q. Now would your testimony be the same with respect to the writing, and so forth, on this one?

A. Yes.

Q. Let me take the next page in order.

A. Yes, that is correct.

Q. And the next page in order?

A. That is correct.

Q. And the next page? A. Yes.

Q. And the final page? A. That is right.

Mr. Ackerson: I will offer this, your Honor.

Mr. Black: That is of course objected to, your Honor, on the same grounds stated this morning.

The Court: It will be received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 19.) [190]

The Court: By "the same grounds stated this morning," you mean the grounds we discussed during the jury recess?

Mr. Black: Yes, your Honor.

The Court: Thank you.

Mr. Ackerson: I will pass this to the jury.

(Passing exhibit to the jury.)

Mr. Ackerson: May I have these three sheets marked next in order?

(Testimony of Walter R. Waldron.)

The Clerk: Plaintiffs' Exhibit 20 for identification.

Mr. Black: Mr. Ackerson, the fact that we objected to these things perhaps still doesn't disqualify us from looking at them.

Mr. Ackerson: I know Mr. Doty has had them.

Mr. Black: We didn't know which ones they were.

Mr. Ackerson: I didn't mean to be negligent on that.

(Exhibiting documents to counsel.)

Q. (By Mr. Ackerson): Mr. Waldron, I thought I had all of the Howard data in the prior exhibit. Can you state whether or not these additional three sheets, marked Plaintiffs' Exhibit 20 for identification, are likewise Howard sheets?

A. Yes, sir. Those were in the same manner and these, as I say, these initials or awarding initials, were there prior to bid date.

Q. You are referring to the upper right-hand corner? [191] A. Yes.

Q. When you say "these initials"?

A. Yes.

Q. And you notice the handwriting and the figures?

A. Yes. This was a 7 per cent markup here.

Now the reason why there is a difference in 7 and 9 on the last one, and so forth, it was so arranged that no two competing bids that were to be put in would be of the same price on the supposedly com-

(Testimony of Walter R. Waldron.)

peting bids. They would vary enough so that it would look real natural.

Q. In other words, the mark-up on the low bids was not always 9 or always 7?

A. No, it was 6 and 4 and 2 and various ways.

Q. And your statement would be the same with respect to the third sheet? A. Yes.

Mr. Ackerson: I will offer this Plaintiffs' Exhibit 20 in evidence.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 20.)

Mr. Black: Same objection, if the court please.

The Court: It being 12:00 o'clock, we will take the noon recess. Will it inconvenience anyone if we convene at a quarter of 2:00 instead of 2:00 o'clock?

Mr. Ackerson: After last night, your Honor, and the [192] courtesy of court and counsel, any time will suit me.

The Court: The adjournment will be until 1:45 today.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:45 o'clock p.m. of the same date.) [193]

Friday, May 6, 1955—1:45 P.M.

The Court: You may proceed.

Mr. Ackerson: Thank you, your Honor.

WALTER R. WALDRON

called as a witness on behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

Mr. Ackerson: Mr. Clerk, may I have this marked Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiff's Exhibit 21 for identification.

(The document referred to was marked Plaintiffs' Exhibit 21 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 21 for identification, and ask you if you can identify these sheets as sheets similar to those contained in the immediately preceding plaintiffs' exhibits.

A. Yes, they are similar.

Q. Do you note any differences on any of them?

A. Yes, there is one that was my work in making up what we call a takeoff from a set of plans.

Q. Does the difference arise in that it has a takeoff formula and data in the sheet?

A. Yes. This is the only way we were able to arrive at a cost or bid price, by having all items in this job, that [194] is, under our work, put down and extended and totaled and estimated piece by piece.

Q. Now, you are referring to the fourth sheet on this exhibit for identification, are you not?

(Testimony of Walter R. Waldron.)

A. Yes.

Q. There being three sheets ahead of it?

A. Yes.

Q. Now, will you explain what distinction there is between that sheet and the previous sheets we have been talking about?

A. The difference is this has a complete job on it and can be totaled and arrived at as a cost to accompany a material cost, labor and trucking and other component operations, to complete a job.

Q. Did you take that information yourself? Is that your own work?

A. That is my work, yes.

Q. Well now, were you working for Downer at that time? A. Yes.

Q. Did the Downer Company get that contract?

A. Yes, I would give it to Mr. Griswold and he, in turn, would extend all these items.

Q. I think you misunderstood my question. Did the Downer Company, were they successful in their bid on that particular job? [195]

A. Oh, no, they didn't try to get this job, as this sheet will show, because it was never tallied and no cost workup was ever put onto it.

Q. Are there any other substantiating or unusual markings or procedure on that particular fourth sheet you are talking about?

A. I find on the back the word "SO," or, the letters "SO," which through these sheets in sequence have so far been allotted to The Sound Control Company.

(Testimony of Walter R. Waldron.)

And I have here note paper written in what I believe is the handwriting of Mr. Arnett of the R. W. Downer Company and certain prices here. And then certain percentage marked up above that price. And then on the other side there is a typewritten quotation sheet which we have when we bid over the telephone. These are allocated by telephone.

Q. Is the price, or, does the price on that quotation sheet correspond with the markup, with the marked-up price or the lower price on the other side of the paper?

A. No, the sheet for quotation is of the higher figure.

Q. That was the Downer quotation?

A. Yes.

Q. You did not get that job?

A. No, we didn't.

Q. Now, otherwise referring to the other sheets in [196] this exhibit for identification, do you find any other distinctions or differences that were not found in the previous exhibits?

A. Well, yes, in this one (indicating).

Q. You are referring to the first sheet?

A. That is the first one. There is no takeoff effort at all or specification effort, and there is no workup of materials, labors, and et cetera.

Q. Now, I note there is a scratch pad sheet with some handwriting on it stapled to the inside of the first sheet. Can you explain any significance of that?

A. That again, I believe again is Mr. Arnett's handwriting, and he jotted this down, and then in

(Testimony of Walter R. Waldron.)

turn put a greater price on the sheet for [197] bidding.

Q. You mean on the Downer bid?

A. On the Downer bid, and the Downer bid was quoted at a larger figure, and this job was taken by Shugart & Company.

Q. Well, now, we have covered 1 and 4. Do you note any similar material on No. 2?

A. No. 2 is like No. 1, it is blank on both sides, there is no specifications nor materials of take-off of room sizes, elevations, or sections, and again there appears the name of Shugart here in Mr. Arnett's —I am going to say this is Mr. Arnett's—handwriting, and it says that Shugart's face bid is this, so much money here, and then the bid we quoted at that time was a certain percentage higher, as you can note.

Q. You are referring to sheet 2? A. Yes.

Q. Do you find similar information on sheet 3?

A. On sheet 3 it is similar to sheet 2, in that it has hand written notation which is also, I will say, in the handwriting of Mr. Arnett, and at the top where there is a "H" and a portion, I will say, of an "O," and the rest has been torn away, that over here we have the "H. O." under the "L5," at the time they decided to use numbers instead of initials, and a larger quote for the Downer Company than is listed here on this note paper. [198]

Q. In the longhand writing of Mr. Arnett, is that right?

Mr. Black: Pardon me, if the court please. That

(Testimony of Walter R. Waldron.)

last one was testimony by counsel, I think. We will have to object to it on the ground it is leading.

Mr. Ackerson: He had previously testified that that was Mr. Arnett's writing.

The Court: Let us square it up. Do you know whose handwriting it is?

The Witness: Yes.

The Court: Whose handwriting is that?

The Witness: Mr. Arnett's handwriting.

The Court: Are you familiar with that handwriting?

The Witness: Yes, I worked with him a year and a half or so.

The Court: Did you see him sign this or are you identifying it from your familiarity with the handwriting and occupation of this particular writer?

The Witness: There were times when he would bring this out and make notes on my desk for bidding purposes, and I am comparing his handwriting with his initials that are oftentimes under it, and I believe I am right in that it is his handwriting.

Q. (By Mr. Ackerson): You are acquainted or were acquainted for over a [199] year or more time with Mr. Arnett's handwriting? A. Yes.

The Court: Is that sufficient, Mr. Black?

Mr. Black: It is a little bit hazy.

Have you ever seen him write?

The Witness: Oh, yes, many times.

Mr. Black: And you state you believe this is his handwriting, but do you recall that particular document as bringing it out to you?

(Testimony of Walter R. Waldron.)

The Witness: Not this particular one, Mr. Black, but there were many during my time with him.

Mr. Black: You have no actual recollection of that document at all?

Mr. Ackerson: Of Mr. Arnett signing it, you mean?

Mr. Black: Yes.

Mr. Ackerson: In his presence?

Mr. Black: Yes.

The Witness: I have seen him sign this right here where it would say "Okay, R.W.A.," in my presence on various occasions. You have some here I noticed a while ago, right here, for instance, "quote okay, R.W.A."

Q. (By Mr. Ackerson): And you are referring to the second sheet in the document there?

A. Yes. [200]

Mr. Black: I renew my objection that he hasn't sufficiently identified the particular document he was talking about.

The Court: It is a jury question as to whether he has or has not, but they will take the testimony of the witness and not the leading questions that were originally by counsel.

Mr. Ackerson: I am sorry about the leading questions, your Honor. I think I am trying to rush this a little bit.

Q. Now we have covered the first four pages, Mr. Waldron. Is there anything different on the fifth page or the fifth set of documents here?

A. Yes.

(Testimony of Walter R. Waldron.)

Q. Relating to the Floral Drive, Whittier School bid, that you can depict as distinguished from the Howard documents?

A. In that the take-off was made by my associate, Elmer Lysfjord.

Q. How do you determine that?

A. By the initial "E" up here. That was often done—I must go back to what we call the green sheet, a publication of all works in the building industry, and one member of the office staff would clip these out and attach them to a sheet of this nature, and they would determine through area for which we covered the majority of general contractors in [201] that area, and the person covering that area would be designated to make the take-off because he had that little advantage of 5 against 3 in order to get the job. And this particular one happened to go to Elmer, and he made a take-off—I recognize the way he does it, and he can verify that—however, it was never extended.

Q. By "never being extended," you mean what?

A. It wasn't totaled up, it wasn't added and multiplied and the various materials haven't been separated, and consequently no work-up of cost material, freight, nails, moldings, and things that are necessary, vitally necessary, before you know what you are bidding on.

Q. Well, now, I notice on the back of that part of the exhibit there is some more longhand writing on a scratch pad. Can you identify that writing?

A. I believe it is Mr. Arnett's writing. I don't re-

(Testimony of Walter R. Waldron.)

member this particular item. I believe he would have given this to my associate, Elmer, to follow up as he has with me on jobs that I was supposed to take care of, but I believe that is his writing. And it is marked up. He has a certain amount there, and then it is marked up, and this one I believe can be found out that it went to the Shugart Company.

Q. And is there any indication on the document itself?

A. Well, this particular one was unbeknownst to us—I say "us," the salesmen were not supposed to know about [202] this, and I didn't know about it until later on in the late fall of '51—what we were actually in with, and this one says "checked by D," which was that the Downer Company was to have someone make a check, or make a take-off on that particular piece of work, in order to assure the person who is supposed to get the job that they are in line in their quantities of material and specifications. [203]

Q. Can you state from this document that Shugart did get the job?

A. Yes, this indicates that Shugart did get the job, and I believe it can be found out at the School Board.

Q. The Downer Company never did complete sufficient data for a bid?

A. No; no, they didn't. They weren't interested, apparently, in that job.

Mr. Ackerson: I will offer that as the others, as Plaintiff's next in order.

(Testimony of Walter R. Waldron.)

Mr. Black: Subject to the same objection, if the court please, that there is no connection shown with the defendant Flintkote; same ground covered in our motion this morning.

The Court: Received into evidence.

(The document heretofore marked Plaintiffs' Exhibit 21 was received in evidence.)

Mr. Ackerson: May I have this series of documents marked Plaintiffs' Exhibit next in order for identification.

The Clerk: Plaintiffs' 22 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 22 for identification.)

Mr. Ackerson: This next series of documents, may I have that marked for identification as Plaintiffs' next in order?

The Clerk: 23 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 23 for identification.) [204]

Mr. Ackerson: And the next series of documents, marked similarly, Plaintiffs' next in order for identification?

The Clerk: Plaintiffs' 24 for identification.

(The documents referred to were marked Plaintiffs' Exhibit 24 for identification.)

Mr. Ackerson: And a single document, marked Plaintiffs' Exhibit next in order for identification.

The Clerk: Plaintiffs' 25 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked Plaintiffs' Exhibit 25 for identification.)

Mr. Ackerson: And similarly, the next number of documents.

The Clerk: Plaintiffs' 26.

(The documents referred to were marked Plaintiffs' Exhibit 26 for identification.)

Mr. Ackerson: Similarly, I hand you another number of documents to be marked as Plaintiffs' Exhibit next in order.

The Clerk: Plaintiffs' 27.

(The documents referred to were marked Plaintiffs' Exhibit 27 for identification.)

Mr. Ackerson: I hand you another set of documents to be marked similarly.

The Clerk: Plaintiffs' 28.

(The documents referred to were marked Plaintiffs' Exhibit 28 for identification.)

Mr. Black: Are these the same general type of documents, [205] Mr. Ackerson?

Mr. Ackerson: Yes, Mr. Black, these had been submitted to Mr. Doty.

If it is agreeable with you, Mr. Black, I am going to ask the witness the general question with respect to each of these documents, as to whether or not his testimony would be the same as in connection with the exhibits prior to the last exhibit entered.

(Testimony of Walter R. Waldron.)

In other words, the general evidence that he gave with respect to the Howard set of documents.

Mr. Black: There will be no objection to that, subject, of course, to our objection to this entire line of testimony.

Mr. Ackerson: Yes.

Mr. Black: And our motion to strike it.

Mr. Ackerson: Yes. I am merely trying to conserve time, without a lot of repetition.

Q. (By Mr. Ackerson): Mr. Waldron, I show you Plaintiffs' Exhibit 22 for Identification, and ask you if your testimony in connection with the similar documents, relating to the Howard Company bids, would be the same with respect to this exhibit or substantially the same as it was in connection with the prior exhibits mentioned.

A. The only exception would be that these were The Sound Control jobs given by the other contractors.

Q. In other words, Exhibit 22 for Identification relates [206] to similar bids in which Sound Control obtained the job? A. That is right.

Q. Would your testimony be the same with respect to Exhibit 23 for Identification, with the exception that another contractor got those jobs?

A. Yes, this would be Acoustics, Inc.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 24 for Identification.

A. Yes, these went to the Shugart Company.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 26 for Identification.

(Testimony of Walter R. Waldron.)

A. Yes, these were allotted to the L. D. Reeder Co.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 27 for Identification.

A. Yes, these were allotted to the Paul H. Denton Company.

Q. I ask you the same questions with respect to Plaintiffs' Exhibit 28 for Identification.

A. Yes, there seems to be one for about four different people in there.

Q. Will you state the people that are listed in there, in that exhibit?

A. The first one is L. D. Reeder and the second one is Sound Control. The third—may I pull this off here (indicating)? [207]

Q. Yes.

A. ——would be Coast Insulating Products.

Q. Louder, please.

A. Coast Insulating Products. This is four, isn't it?

Q. Yes.

A. Four would be Coast Insulating Products. Five and last would be Shugart Company.

Q. Would your answers be substantially the same, with the final exhibit for identification, Plaintiffs' Exhibit No. 25?

A. Yes. That is the Coast Insulating allotment.

Mr. Ackerson: I will offer Plaintiffs' Exhibit 22 for Identification in evidence.

I will offer Plaintiffs' Exhibit 23 for Identification.

(Testimony of Walter R. Waldron.)

Plaintiffs' Exhibit 24 for Identification, I will offer.

Plaintiffs' Exhibit 26 for Identification, I will offer.

Plaintiffs' Exhibit 27 for Identification, I will offer.

Plaintiffs' Exhibit 28 for Identification, I will offer in evidence.

Plaintiffs' Exhibit 25, I will offer in evidence.

Mr. Black: Of course, if the Court please, they are subject to the same objection and to our motion, and all the testimony in connection with the subject.

The Court: The offered exhibits are admitted into evidence. [208]

(The documents heretofore marked Plaintiffs' Exhibits 22 to 28, inclusive, were received in evidence.)

Mr. Ackerson: Now, if Your Honor please, in view of a memorandum which has just been promised Your Honor I am going to close the direct with Mr. Waldron, with the exception that if Mr. Black's understanding with me is approved by Your Honor, I will be able to call Mr. Waldron back for the limited purpose of testifying on maybe a couple of points on damage, which will probably have to be resolved in the light of Your Honor's acception and consideration of the legal memorandum.

Any objection to that?

Mr. Black: No objection to that. That is satisfactory.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Is that satisfactory with the Court?

The Court: It is satisfactory with the Court if it is with counsel.

Mr. Black: Yes, we will so stipulate, he may be called back for that limited purpose.

Mr. Ackerson: You may cross-examine, Mr. Black.

Cross-Examination

By Mr. Black:

Q. Mr. Waldron, when you were enumerating the manufacturers of acoustical tile in the Los Angeles area you didn't mention Fiberglass, if I recollect correctly.

Do you remember there was such a product in the local market? [209]

A. Yes, I do, but I didn't remember of mentioning where they were manufactured, Mr. Black.

Q. You didn't include it among the manufacturers' products in the local market, as I recall your testimony. A. Oh, I see.

Q. There was such an acoustical tile sold in Los Angeles at the time?

A. I don't believe, Mr. Black, that that would be considered a competitive material with the material that we were buying at the time.

Q. Why not?

A. It is a premium type material and it is more expensive than the material, and it doesn't do any more work than the material we were buying at the time.

(Testimony of Walter R. Waldron.)

Q. Did you know how much was being sold in the local markets and installed by some of the acoustical contractors?

A. Yes, wherever it was specified.

Q. Do you happen to know the company that makes that product?

A. Owens-Corning, I believe, Fiberglas Corporation. [210]

Q. And that is an AMA tile, is it not?

A. I believe it is.

Q. I now refer to your testimony in connection with the first meeting with the Flintkote people that you attended, which I believe you state took place at the Manhattan Supper Club.

A. I believe it was, Mr. Black, of an official nature.

Q. All contacts prior to that time were more or less informal ones with Mr. Ragland, was my understanding correct?

A. I think that is right.

Q. Do you recall giving a deposition, Mr. Waldron, on October 13, 1952, in connection with this case? A. Yes, sir.

Q. Now, I invite your attention to page 18 of that deposition—do you wish to refer to it, Mr. Ackerson——

Mr. Ackerson: I don't have it.

Mr. Black: You can look over my shoulder.

Q. ——and ask you if you gave the following testimony, I will start at line 13 so it will become more intelligible:

"Q. Now, did you, during this time of explor-

(Testimony of Walter R. Waldron.)

ing the possibility of a supply of acoustical tile, talk to anybody representing Flintkote on the subject of a supply? [211] A. Yes.

"Q. Now, so we will have an orderly development of it, I take it you had more than one conversation on the subject with Flintkote. Tell us when the first one was, about, and who was there.

"A. I can't remember which was first, but I remember being in their office, and I am going to assume that was first. I believe it can be established later, if necessary.

"Q. That was in the Flintkote office?

"A. I believe it was.

"Q. Whom do you now recall was there that was interested and you spoke with?

"A. I believe I met Mr. Baymiller and Mr. Thompson and Bob Ragland in the office at that time.

"Q. About when was that, to the best of your recollection?

"A. Well, I don't know for sure. I think it was somewhere along in the fall of '51.

"Q. Was Mr. Lysfjord there at that time?

"A. Yes.

"Q. Tell us, to the best of your recollection, what was said at that meeting by any persons [212] present.

"A. Well, I think that meeting was generalities and background and how long we have been operating in the business and what we knew about it.

(Testimony of Walter R. Waldron.)

"Q. You mean questioning of you?

"A. More or less, I think, and general get acquainted meeting.

"Q. Were the subjects of credit and available investment capital discussed?

"A. I hardly think so at that time. I believe that was the first meeting. I think that they probably assumed that we either had something to operate on or we wouldn't be there until such a time that we felt——"

I am trying to pass over some material that doesn't appear relevant to this subject.

Going on to page 21, you were asked about some various other matters of preliminary operations of the business and you stated:

"A. It was agreed on that we should sell in the Los Angeles area.

"Q. Now, you say that was agreed upon. Tell us how that—— A. It was a verbal agreement.

"Q. When, at that meeting? [213]

"A. No, I think it was a different meeting. That first meeting—you brought that in—but the first meeting, it was just generalities and getting acquainted."

Now, did you give that testimony? [214]

A. I think so, but I believe that, as was mentioned there, that I wasn't sure which was the first and which was the second meeting, if that is what you are trying to establish at the moment.

Q. That was rather shortly after the events that we were talking about, wasn't it?

(Testimony of Walter R. Waldron.)

Mr. Ackerson: I would like, Mr. Black, to state what events you mean. I mean it is rather indefinite. I will object to it on that ground.

Q. (By Mr. Black): The date is October 13, 1952. You have no reason to doubt that the date is not correct, that the deposition bears?

A. No, not at all.

Q. Now on page 23 I will ask you if you recall giving this testimony:

"Did you have a later meeting with Flintkote or its representatives on the subject of its proposed line?

"A. Yes, sir; I think when they decided we were a good risk. We had a meeting where we—I don't remember words, however——

"Q. Well, about when did it happen?

"A. I don't know, probably a couple of weeks or a week or two after the one I just [215] mentioned.

"Q. That would still be in '51? A. Yes.

"Q. Might it be in December of '51?

"A. Well, I don't think it is quite that late. I believe it must have been in November, somewhere in there.

"Q. Mr. Lysfjord was there? A. Yes.

"Q. And you both, at that time, still were with the Downer Company, I take it? A. Yes.

"Q. Who else was there?

"A. Mr. Baymiller and Mr. Thompson and Mr. Ragland.

"Q. Where did it occur?

(Testimony of Walter R. Waldron.)

"A. It occurred at lunch, in a cafe.

"Q. Manhattan Club?

"A. I think that was it.

"Q. On Western Avenue in Los Angeles?

"A. Yes.

"Q. Tell us what was said then by anybody.

"A. Well, I think generalities were again brought in and the fact they were very pleased with what we had to offer as an outlet for acoustical tile, and they felt—and it was virtually [216] assured that we would be an outlet, and for us to prepare a financial statement.

"Q. What had you shown them as to what you had to offer, what information had you given them or did they obtain, if you know?

"A. Any information I gave them was verbal."

Then on page 36 you were asked the question, at line 5:

"Q. Aside from the second meeting with Flintkote representatives that you could recall, which was at the Manhattan Club, do you recall attending any later meeting on the subject of obtaining a supply from Flintkote?

"A. I think that was the last meeting. As a matter of fact, that was the last meeting where they assured us that they would go along with us on the deal and sell us tile and they assured—I—they—I can't remember all those things.

"Q. Do you remember attending more than one meeting at the Manhattan Club with Flintkote people on the subject of obtaining the supply?

(Testimony of Walter R. Waldron.)

"A. No, that is the only meeting there.

"Q. You had one before that that you could recall at the Flintkote office?

"A. Yes, I am sure it was at the Flintkote office."

Do you recall giving that testimony? [217]

A. I am sure I did, Mr. Black.

Q. And in that testimony you omitted completely any discussion of a meeting with Mr. Harkins and stated the last meeting you had was the one at the Manhattan Supper Club. That is not the fact, as I understand you?

Mr. Ackerson: I object to Mr. Black's construction of the language. I think it speaks for itself. I don't construe it the same way at all, nor do I see any inconsistency.

The Court: He is asking him now whether it was or was not the fact.

Q. (By Mr. Black): Is it not the fact that you made no mention in that deposition of a meeting with Mr. Harkins?

Mr. Ackerson: Along the line you have read?

Q. (By Mr. Black): Or anywhere else in the deposition after the meeting at the Manhattan Supper Club which, according to your testimony, was the last meeting you had? You did not say anything about a meeting with Mr. Harkins?

A. I don't remember the deposition, Mr. Black, but the meeting in the office of the Flintkote people that I refer to there I believe was the last meeting

(Testimony of Walter R. Waldron.)

that I was referring to as in their office rather than when it took place.

Q. What has happened since the giving of this deposition that has caused your recollection to be changed on [218] the subject, if you know?

A. What change did you have in mind, Mr. Black?

Q. Well, if I am quoting you incorrectly, please let me know. I don't want to take any unfair advantage of you. But according to this testimony you stated very positively that the first meeting was at the Flintkote office that you attended, that the second meeing was at the Manhattan Supper Club, and that there was no other meeting, and you made no mention of the Harkins meeting. Now if that is an unfair construction I want you to tell me, and if it is a fair construction I would like to know what it is that has refreshed your recollection since you gave that testimony?

Mr. Ackerson: I object to Mr. Black using his own construction and I say that it is not an accurate construction of the language you read from the deposition. I have no objection to him going to the deposition and rereading the language and interrogating the witness.

The Court: Do you want to accept the suggestion of counsel or do you want a ruling on the propriety of the question?

Mr. Black: I would submit to the Court's ruling on the matter.

The Court: Objection overruled.

(Testimony of Walter R. Waldron.)

Mr. Witness, if you don't understand the question, say so, and then counsel will have to reframe it, whether it is [219] a proper question or not. It isn't a proper question in a practical sense if you don't understand the question, so we will ask the reporter to read it back to you and if you understand it, answer it, and it being somewhat lengthy you may give a lengthy answer, but if you don't understand it, you say so and Mr. Black will reframe it.

> (The question referred to was read by the reporter as follows: "Q. Well, if I am quoting you incorrectly, please let me know. I don't want to take any unfair advantage of you. But according to this testimony you stated very positively that the first meeting was at the Flintkote office that you attended, that the second meeting was at the Manhattan Supper Club, and that there was no other meeting, and you made no mention of the Harkins meeting. Now if that is an unfair construction I want you to tell me, and if it is a fair construction I would like to know what it is that has refreshed your recollection since you gave that testimony.")

The Witness: To answer one question about Mr. Harkins, I don't know that I was asked to relate—I don't know how that was in the deposition. However, meeting Mr. Harkins did happen, and being in the Manhattan Supper Club for lunch did happen. [220]

(Testimony of Walter R. Waldron.)

Q. (By Mr. Black): Is there any particular event that has caused you to get the order of these meetings changed in your mind?

A. I wasn't sure of them at that time, as I stated.

Q. Are you sure of them now?

A. I believe I am, yes.

Q. What causes you to be sure of them now, when you weren't sure of them in 1952?

A. This going back through my years of work and trying to find out which was first, which I did, and talking to my associate. He helped me find out which was which.

The Court: I think some of these jurors have served only in criminal cases where depositions are very rare, so it might be appropriate to have a brief explanation of what a deposition is.

When a person brings a lawsuit against another, the one that is sued has the right to call the one who is doing the suing into their attorney's office and ask them questions under oath, having present a Court reporter, such as we have here. That right exists also as to prospective witnesses in a case.

It is done so that the person opposing the suit can explore into the basis for the suit and determine what factual situations they are called upon to defend against.

It is also done to preserve the testimony of a witness [221] who might not be available at the time of trial, so that the deposition might be read in

(Testimony of Walter R. Waldron.)

place of getting along without the testimony of the witness.

What Mr. Black has been reading from is a deposition taken by him on behalf of his client Flintkote Company, shortly after this witness commenced his action against The Flintkote Company and others.

Is that a sufficient statement, counsel, or does it need to be amended or clarified in some way?

Mr. Black: So far as I am concerned, Your Honor——

Mr. Ackerson: It is an adequate statement, Your Honor. Since plaintiffs took a deposition, likewise, I think the jury should know the plaintiffs have a similar right.

The Court: Yes. I didn't mention that because we didn't have the plaintiffs' deposition before us at the time. That is the common right in lawsuits. Any suit that amounts to much, either side takes a deposition of everyone they can think of on the other side, so they can learn what that other side's witnesses are going to say at the trial.

Mr. Ackerson: That suffices. I was merely trying to save the Court's time, rather than have them instructed again, in the event I use a deposition.

The Court: Thank you.

The Witness: May I ask a question?

The Court: The witness says, "May I ask a question?" [222] That is out of character, for the person who is in the capacity of a witness, who is

(Testimony of Walter R. Waldron.)
here to answer questions. Perhaps he has something he wants clarified.

Go ahead and ask it. There might be an objection.

The Witness: I would like to ask my counsel if he has my corrected copy. I think I made some marginal notes in there some time ago.

Mr. Ackerson: I feel apologetic to my client and the Court and counsel. I have carried those to the Court every day except today. I do know there were marginal notes on it.

I might ask the Court—not to instruct—but merely inform the jury it is customary to make some changes. Perhaps that can be delayed, because we don't have the changes here and I realize there is an explanation to be made when the witness does change, in substance, his deposition.

So I will withdraw the request.

I do not have your deposition here, Mr. Waldron.

Mr. Black: I will make the stipulation with Mr. Ackerson that if, after this examination is completed, we find that any of the answers I read to him from the deposition were, in fact, corrected by interlineation, you may recall him to explain it.

Mr. Ackerson: Thank you. I don't believe it is necessary, Mr. Black. I have seen those corrections and I don't believe, frankly, there is anything to correct. [223]

Q. (By Mr. Black): During the course of this trial, Mr. Waldron, I think you testified that at the meeting at the Manhattan Supper Club with Mr. Thompson, Mr. Ragland and Mr. Baymiller, you

(Testimony of Walter R. Waldron.)

stated that, you made the statement that the acoustical contractors weren't competing with each other any more and that they wouldn't object to your coming into this business.

A. That I would not object?

Q. No. And that they would not, the other acoustical contractors, to your coming into this field.

A. That is right, sir.

Q. Do you recall giving a deposition at my office last Tuesday? A. Yes.

Q. Do you recall my asking you about that conference and asking the question, "Now, is there anything else that happened there?"

And you stated, "No, there is nothing else."

And do you recall that you did not testify about any general contractors not competing with each other?

A. Mr. Black, I don't know how I used that in your office. But that is the knowledge that I passed to Mr. Thompson, and Mr. Baymiller and Mr. Ragland were present, and Mr. Lysfjord.

Q. What refreshed your recollection about that particular [224] matter between Tuesday and the present date?

A. I believe I mentioned that that was all I could think of at the moment. Do you want to read that back?

Q. That is perfectly correct, all you could think of at the time? A. Yes.

Q. Apparently, you couldn't think of it then and

(Testimony of Walter R. Waldron.)

I am asking you now what made you think of it between Tuesday and the present date, if anything?

A. Refreshing my memory from note—I don't have the note here, but notes I made after your deposition, or the first deposition, and to train my mind to think of the ways in which it actually happened, rather than trying to guess about it at this time.

Q. You did not bring those notes with you?

A. No, I don't have any here.

Q. May I ask that you produce them so I may examine them during the course of the trial?

A. I will do my best, sir.

Q. Now, at this meeting at the Manhattan Supper Club, at which the three Flintkote representatives were present, and you and Mr. Lysfjord, do you recall Mr. Thompson telling you that there was no possibility of you people being given a general permission to operate in the Los Angeles area?

A. No, sir, he didn't say that, sir. [225]

Q. Do you recall asking him whether it would not be permissible for you to deal in Los Angeles with certain contractors with whom you had a particularly close connection, and his replying to you at that time that if anything of the sort comes up it will have to be dealt with as a special case? Do you recall that? A. No, sir, I don't.

Q. Do you recall either Mr. Lysfjord or yourself at that conference asking whether it would not be entirely in order for you to have the merchandise you purchased from Flintkote shipped to San

(Testimony of Walter R. Waldron.)

Bernardino and then hauled back into Los Angeles? A. That didn't occur, sir.

Q. That did not happen?

A. That is right.

Q. You do now recall the meeting with Mr. Harkins, I presume? A. Yes, sir.

Q. Has anything come up that has enabled you to fix with any definiteness the date of that meeting?

A. No, I don't have anything that would put that meeting on record as of a date.

Q. There is no note or diary entry, or anything of that sort that enables you to fix that date with any definiteness? [226]

A. No, I don't have one.

Q. What is your best recollection of the date of that meeting?

A. I would say it was the latter part of November, '51.

Q. Could it have been early December?

A. I don't believe so. At least, that is not my recollection, because I believe I can point that out, because we didn't rent our local office until after that meeting, and that was rented right around the first of December.

Q. Do you recall Mr. Harkins stating at that meeting that he wanted to be sure that you people, that is, you and Mr. Lysfjord, felt there was enough business in the San Bernardino-Riverside area to enable you to make a living?

A. No, he didn't quote, or, say anything like that in my presence.

(Testimony of Walter R. Waldron.)

Q. Do you recall making an answer to the general effect that you knew the territory pretty well and that there were enough malt shops out there to make a go of it?

A. On the contrary, sir, I didn't know the area at all, other than in an acquaintance I have out there that I would go and see occasionally, in the California Decorating Company, which is out of the acoustical field. [227]

Q. Hadn't you had prior experience as a salesman in that area? A. No, I hadn't.

Q. None at all at any time?

A. Not that I can recollect, other than maybe a rare occasion where some contractor here would send me out there to look at a certain job, but I never made any contacts out there in general construction work.

Q. Now I think you have testified, Mr. Waldron, that you were working for the Downer Company until January 10, 1952, am I correct on that?

A. Yes, I believe that is correct, sir.

Q. That you asked to be relieved at the end of December and they requested that you stay on until January 10, is that right?

A. That is right, sir.

Q. What did your duties with the Downer Company consist of until you terminated relations with them on January 10th? A. Sales work.

Q. Of what character? A. Acoustical.

Q. Well, I mean calling on new contacts or examining jobs that were already being installed,

(Testimony of Walter R. Waldron.)

or what in general did you do, if you remember, during that last period of your [228] employment with Downer & Company?

A. Just the same work I had always done, make take-offs, estimate jobs, work them up, bid them, but they were getting fewer and fewer because I didn't have the time, and I put a great deal of time in on my own enterprise.

Q. How much time did you give to Downer & Company during that period on the average a day?

A. That was not a problem. If I understand you right, I was never obligated to the Downer Company for any amount of time.

Q. I am not asking you about the ethics or the morals of your obligation; how much time, if you remember, did you put in on Downer & Company's work during the last month, say, of your connection with that concern?

A. I would say just about the same as I had always done. I don't know how to answer that, Mr. Black, for sure. But there were days before I ever decided to go into the business myself that I would go to the beach or I would go to the mountains, I wouldn't show up at all. But the results of my efforts at the end of the month was what they were interested in.

Q. During this period when you were still in the employ of the Downer Company, were you doing any work in the way of actually placing bids for your own enterprise?

A. Not at all. We were not ready. [229]

(Testimony of Walter R. Waldron.)

Q. You weren't soliciting any business on your own at all? A. No, sir, we weren't ready.

Q. So you didn't start that until after January 10th? A. Start what?

Q. Any solicitation of work for your own account.

A. I don't believe I started it even then because I don't know that we were quite ready. After we had our phones and stationery, we couldn't do much other than talk about it.

Q. Where was the Downer office?

A. On Hoover Street. I can't remember the number now. But it is just north of Beverly Boulevard about a block or two.

Q. That would be around Temple and Hoover, would that be about right?

A. Yes, it is three-something, I think it is three-something or other. I don't remember the address. I can get it for you.

Q. Did you go there practically every day during that period?

A. Oh, no. I never went there every day. That is one place a salesman can't make money, is in an office.

Q. How often did you go?

A. Perhaps once a week or twice a week as my needs arose. [230]

Q. Did you make it a practice to telephone there daily? A. Oh, yes. I picked up messages.

Q. From what place did you do your telephoning?

(Testimony of Walter R. Waldron.)

A. Any phone booth or any office I might be in if they had a phone free or from my home.

Q. Where was your home? A. Hollywood.

Q. How far from the Downer office was your home?

A. In mileage I don't know; it is probably three miles, four miles.

Q. Now when did you go to San Bernardino?

A. To do what, sir?

Q. To start the aabeta operation?

A. I was out there right at the first of the year, to locate, and I found a shop or warehouse. That was the first efforts I made even to do the mechanics of the aabeta company's efforts in San Bernardino.

Q. At that time did you make any contacts with prospective customers in the San Bernardino area?

A. No.

Mr. Ackerson: Mr. Black, I don't like to object any more than I have to, and I am not objecting now, but I am assuming you are talking about his first visit. I don't know whether he stayed a week or a month, but by the first visit I assume you are talking about a day. [231]

Mr. Black: I am talking about being out there in January.

Q. How long did you remain in January in the early days of your operations there when you got your lease?

A. I would be out there probably two, three days, maybe a week at a time, depending on events,

(Testimony of Walter R. Waldron.)

and the latter part of January I was out there at least three or four days a week.

Q. Where did you stay?

A. At various auto courts and oftentimes with my friend Bill Keown of the California Decorating Company. He has a residence there and I would stay there quite a bit.

Q. Did you stay at the Antlers Hotel in January of 1952 in San Bernardino?

A. I can't remember at the moment, but I believe I stayed there once or twice.

Q. You did, in fact, stay at that hotel at least on one or two occasions?

A. I can't even remember for sure, but I do have dinner there a great deal because it is a nice place to eat.

Q. Did you stay out there from the time you obtained your warehouse space until the first shipment of tile arrived?

A. I don't believe I did.

Mr. Ackerson: Mr. Black, are we still referring to the San Bernardino warehouse?

Mr. Black: Yes, we are still referring to San Bernardino. [232]

The Witness: I know I was out there off and on. I am out there off and on virtually year in and year out, because of the California Decorating Company, of which I hold an honorary office, and we do jobs together.

Now at any particular time I don't have any records of when I stayed, what length of time, but

(Testimony of Walter R. Waldron.)

I do believe I stayed at the Antlers Hotel once or twice out there.

Q. (By Mr. Black): It is probable, is it not, Mr. Waldron, that you stayed out there from the time you got your warehouse space until that first shipment of tile arrived from the Flintkote Company?

A. Oh, no, I went out there that morning. I believe I went out there that morning.

Q. How did you do it was coming out?

A. The Flintkote people told us.

Q. So you went out especially on that occasion to——

A. Receive it. I went out to receive it, that is right.

Q. And you had still left the address of the California Decorating Company on the delivery instructions apparently, is that correct?

A. I didn't leave it, I changed it after we got that, but apparently the trucking firm didn't get it because they did go over to the California Decorating Company first and then [233] were referred to the other warehouse.

Q. Were you at the California Decorating Company when it arrived? A. No.

Q. Who referred them to your correct San Bernardino address?

A. My associate there, Mr. Bill Keown.

Q. Were you at the San Bernardino warehouse when that shipment arrived?

(Testimony of Walter R. Waldron.)

A. Yes, I believe I was, and I was anxious about it. It was late.

Q. How many vehicles, if you recall, were used in delivering those cases of tile?

A. It was a truck and a trailer. I guess that is one vehicle, isn't it?

Q. Do you know whether there was more than one tractor?

A. Not at the moment, I don't. I know it was a truck and trailer. There were two businesses, I believe, and they parked one and unloaded one and then they unloaded the other one.

Q. Do you recall whether the second vehicle had only a small amount of tile in it?

A. No, I think they were both nearly full, or full. I don't know for sure. The load tickets would probably show [234] that in the event you have it.

Q. Did you sign on that occasion for that merchandise personally?

A. I am pretty sure I did.

Q. Do you recall whether it was more than one receipt? A. No, I don't.

Mr. Black: Do you have those receipts, Mr. Doty? I think we have a photostatic copy of those. I will produce the originals, if you wish, Mr. Ackerson.

Mr. Ackerson: No, Mr. Black. If you say they are photostats, it is all right to use the photostats.

(Exhibiting documents to counsel.)

Q. (By Mr. Black): I show you, Mr. Waldron,

(Testimony of Walter R. Waldron.)

what purports to be a delivery ticket of the Water-Land Truck Lines bearing the date January 18, 1952, merchandise from the Pioneer-Flintkote Company, consigned to aabeta company, and apparently bearing a signature, aabeta company, W. H. Waldron, at the bottom. Do you recognize that?

A. That would be W. R. I believe it should have been.

Q. Is that your signature?

A. Yes, I am quite sure it is. It sure looks like it. What do you want me to answer?

Q. Whether that is your signature on these two documents. [235]

A. Yes, I am quite sure they are.

Mr. Black: I am sorry I forgot to have these marked for identification first. May we offer these two documents in evidence as—do you use the letters for the defendant?

The Court: Yes; numbers for the plaintiff and letters for the defendant.

Mr. Ackerson: No objection.

The Clerk: That will be A and B.

(The documents referred to were received in evidence and marked Defendants' Exhibits A and B.)

Q. (By Mr. Black): I invite your attention, Mr. Waldron, to the fact that one of these tickets, Exhibit A, shows 924 cartons, and the second exhibit, Exhibit B, shows 76 cartons.

A. Two different sizes.

(Testimony of Walter R. Waldron.)

Q. Two different sizes apparently.

A. What is this date here?

Q. They are both dated the 18th of January, 1952.

A. Do you suppose that is when I signed them, on the 18th? [236]

Q. Well, that is what the date is it bears. That is all we know about it. The trucking company tells us they have no record of it, other than their own books; no recollection of it. A. All right.

Q. You signed for it, apparently?

A. I believe I did, yes.

Q. You signed for them at San Bernardino?

A. I signed one at San Bernardino, but not the small amount; that was signed at their office over here.

Q. On the same date?

A. No—I might have signed—I know what it was, yes.

They couldn't haul it all in one trip and they had to have a second signature to bring the balance at a later date.

There was a few cartons they couldn't do. We had them send those cartons instead of taking them over to our L.A. warehouse. I evidently signed them both there for that reason.

If that is the complete amount of the shipment, then I am right. If that is not the complete amount of the shipment, I signed two, but I don't know why I signed two.

(Testimony of Walter R. Waldron.)

Q. Would Mr. Ragland keep in touch with you during this period with some frequency?

A. During our operations in the aabeta [237] co.?

Q. Yes, sir. A. Yes, sir.

Q. He was out there, was he not, the very day this merchandise arrived?

A. Yes, I believe he was there that—he was there with an associate from his company. I believe he was there the day it arrived.

However, I am not sure. I know he was there.

Q. You went to lunch with him that day, as a matter of fact, didn't you?

A. I believe we did, yes.

Q. Didn't he come there telling you that he was coming to see that the merchandise was in good shape and that he was there for that purpose?

A. I don't know that he mentioned that, merchandise. That is probably one of the reasons. I mean he can verify that.

Q. You looked at the merchandise together as it came off the equipment, did you not, and found it received in apparent good order?

A. So far as I know. I hired some men and they unloaded it. I didn't inspect it particularly. When it was done I looked it over. I don't know what I would be looking for.

Q. You were interested in seeing that the merchandise [238] was apparently in good shape when it got there? A. I am sure it was, yes.

Q. And among other things, you and Mr. Rag-

(Testimony of Walter R. Waldron.)

land gave it a casual inspection as it was coming off the equipment.

A. I was very proud of it, to be truthful with you.

Q. I mean that is true, isn't it?

A. Did I answer your question?

Q. Isn't that a correct——

A. Pardon me?

Q. Isn't that a correct statement, you and Mr. Ragland casually inspected this merchandise as it was coming off and being unloaded?

A. I don't know there was any intent there, Mr. Black, on that purpose.

Q. I am not making a great point of it, but that is what happened, isn't it?

A. I don't believe it was intended to be an inspection trip, Mr. Black, really.

Q. Wasn't that one of the reasons he was there on that particular day? Didn't he tell you so?

A. I don't believe he did.

Q. Well, all right. Mr. Ragland would also frequently drop in at your home, would he not?

A. Yes, he has done that.

Q. Where did he live, if you know? [239]

A. Out in the Van Nuys area, or some—I don't know just what district, but it is by way—he goes by way of what is our Freeway and Cahuenga Boulevard. I live near Cahuenga Boulevard and often times on his way home he would stop by there.

Q. It was quite convenient for him to do so, was it not? It was really in his direct route home?

(Testimony of Walter R. Waldron.)

A. I would say it was virtually in his direct route home.

Q. And he made it a rather frequent practice to stop by and see you and talk to you about business or some social matter, isn't that correct?

A. Yes, I have had the pleasure of his association for 10, 12 years.

Q. Referring to the meeting at which your relations with the Flintkote Company were terminated, I believe you stated in your testimony at the trial that Mr. Thompson told you at that meeting that the reason for the termination was because you were operating in the Los Angeles area, is that right?

A. I believe that is the way he did it, said it or intended it.

Q. I invite your attention to your deposition that was given in October, 1952. I will go back to page 60, and referring to this termination meeting at line 19: [240]

"Q. What did he say, and when did he say it?

"A. On the day of termination I asked him, I said I didn't think the pressure——

"Q. Just a minute. Who was there at that time?

"A. That was Thompson, Baymiller, and Ragland.

"Q. And where? A. At my office.

"Q. Was Lysfjord there? A. Yes.

"Q. What was said?

"A. Well, they said they didn't feel that they could sell us any more, not because of them, because

(Testimony of Walter R. Waldron.)

the higherups decided they'd just have to quit, and they inferred that we were doing something that we weren't supposed to do, but we don't know what it is yet.

"Q. They told you they did not know what it is?

"A. No, I don't know what it is. That will probably come out eventually, but I asked Baymiller, or rather I said that the pressure must have been terrific from our competition to cause this to happen. He said there was pressure, and that is all he said."

Did you give that testimony? [241]

A. I believe I did, sir.

Q. What has caused you to remember that the reason for the termination given by Mr. Thompson was that you were dealing in the Los Angeles area since that deposition was given?

Mr. Ackerson: I am going to object to that, Mr. Black, on the grounds that the evidence you read, or the deposition you read, the witness' answer related solely to Mr. Baymiller. You haven't read anything which stated anything that Mr. Thompson said, and I think it is clear Mr. Thompson did most of the talking at that meeting.

Mr. Black: It is referring to Mr. Thompson. I will go back one more line, line 17:

"Q. What representative?

"A. Thompson."

I announced at the outset he was referring to Thompson.

"Q. What did he say, and when did he say it?

(Testimony of Walter R. Waldron.)

"A. On the day of termination I asked him, I said I didn't think the pressure——

"Q. Just a minute. Who was there at that time?

"A. That was Thompson, Baymiller, and Ragland.

"Q. And where? A. At my office.

"Q. Was Lysfjord there? A. Yes. [242]

"Q. What was said?

"A. Well, they said——"

Mr. Ackerson: I am just objecting to your own wording of it. If you want to ask about that language, I will withdraw it.

Q. (By Mr. Black): Is there anything that has refreshed your recollection on the matters or the reasons given for the termination since this deposition was given? A. I don't know that I——

Mr. Ackerson: Just a minute.

The Witness: ——quite get that.

Mr. Ackerson: I object to the question as assuming a fact not stated in the deposition or in evidence.

The Court: Sustained.

Q. (By Mr. Black): At that meeting did Mr. Lysfjord show Mr. Thompson the door and say he didn't want to speak to him again?

A. Mr. Ragland and I went out first and we were talking at the car, as I remember, and anything after that termination explanation—that is all they could do, they were sorry. Whatever the words were they used, I know they must have felt pretty rough there.

(Testimony of Walter R. Waldron.)

I am assuming again. I am sorry, sir.

What was said after I walked out and Bob and I were talking at the car I can't vouch for. [243]

Q. If any such thing happened you didn't see it, is that what you wish to tell me?

A. That is right.

Q. So you don't know one way or the other? Who went out first?

A. Bob and I, I believe, and we were talking. Then Baymiller came out and then Thompson and Elmer came out. I believe I am right on that.

Q. Now, referring to the so-called takeoff sheets which have been offered in evidence, I would like you to explain just what your duty was in connection with these documents.

A. Do you want in general or do you want me——

Q. Yes, in general. I am not asking at the moment specifically as to the contents of any of them. What was your particular job in connection with these documents?

A. These particular documents you are referring to?

Q. Yes, or other documents of that character.

A. My job was to bid the job if it happened to be a contractor that I was associated with. And the other men in our office, if any contractors that they were well acquainted with, they would take those and from this same sheet would bid. And the sheets I had in my briefcase were given to me to find out why we lost the job.

(Testimony of Walter R. Waldron.)

Q. By whom—— [244]

A. Does that answer your question at the moment?

Q. Yes. By whom were they given to you?

A. Mr. Arnett would do so and he would instruct his secretary, Miss Jagger, Jerry, to get these things ready after bids, and give them to the man whose contractor got the job, and go and find out who, or why we lost it. That puzzled me, too, for a while, believe me.

Q. What did you do after you got these sheets to determine what caused you to lose the job?

A. Put them in my briefcase.

Q. You did nothing about them?

A. Pardon me?

Q. You did nothing more about them?

A. Not at the moment. There is always another job to go and take on.

Mr. Ackerson: I don't think that is a responsive answer. Mr. Black is talking about these jobs (indicating).

Q. (By Mr. Black): I am trying to find out how these particular documents were delivered to you in the course of your duties at the Downer Company, and what you were supposed to do in connection with them, as part of your duties there.

A. That is right. I would take them and go to the contractor and find out why we would lose the job. I would have them in my briefcase, so I would just leave them in my briefcase and throw them

(Testimony of Walter R. Waldron.)

down at home; when and if I got [245] around to cleaning it out. That didn't happen very often.

Q. Did you go to the contractors in every instance to inquire why?

A. Sometimes yes. Sometimes if it was more convenient when I had time I would phone about it.

Q. Except in one or two rare instances you had nothing personally to do with the preparation of these documents, did you? A. No.

Q. Do you know of your own knowledge that the person who prepared that document didn't have some separate memorandum on which he computed the cost and the like?

A. Mr. Black, I was perplexed——

Q. Just a moment. Please answer that question. Do you know of your own knowledge whether the person who prepared those documents didn't have some separate memoranda from which he computed the figures, which resulted in the final figure you put on those papers? A. I do know that.

Q. How do you know that?

A. Because I was perplexed about it, too. I tried to find it. I would get Jerry. I would say, "I have got to have the takeoff. I don't know what I am talking about. I don't know whether I can lower my figure or whether we are bidding wrong or whether we are having some kind of costs [246] here that are not right in our merchandise. How can I know where to bid next time if I can't find out why this bid is wrong?"

(Testimony of Walter R. Waldron.)

Mr. Arnett would say, "We don't have any. That is it."

I would go to him. I asked him.

Q. How many times did you ask him?

A. I asked two people—I asked three people. I asked Mr. Griswold. I asked Jerry, the second, and I asked Mr. Arnett. And that sort of told me I didn't need to ask any more.

Q. Did you ascertain from any independent investigation on your own part, personal investigation, what the figure for the bid or the low figure on the particular sheet was derived from?

If I understand you correctly, there is a figure on those sheets and then there is a higher figure.

A. Yes. [247]

Q. Did you make personal inquiry to find out where this lower figure came from in any instance?

A. Yes, Mr. Griswold would tell me that that lower figure was a certain contractor, that that was after I pressed him to a point late in the fall of why I was losing jobs and not getting a chance to actually bid them, and Mr. Griswold would say, well, that had to be a job for somebody and we were given a complimentary figure.

Q. Did you ever personally make a check with the bidder on the particular contract to verify that?

A. I don't know that I follow you, Mr. Black.

Q. I say, your information, as I understand it, came from what Mr. Griswold told you which he in turn got from somebody else.

A. Yes. Mr. Birchenall, Jim Birchenall, who

(Testimony of Walter R. Waldron.)

was employed with the Schugart Company at that time, told me that they were worried about their position of not getting jobs because they in turn had these blank take-offs in their office also; and that was in the presence of Louis A. Downer, another acquaintance sitting at the same table.

Q. Did you ever personally go to the successful bidder on those sheets and find out what the amount of the bid really was? A. Did I do what, sir?

Q. Ever go to the successful bidder with respect to any [248] one of these sheets to find out what the amount of the bid was?

A. I didn't need to. I called the general contractor and asked him what the job went for, and he would tell me.

Q. Did you do that in every instance?

A. I think I did.

Q. Was that part of your duties with the Downer Company to do that?

A. That is the general rule of our sales manager, is to find out why we lose jobs and then make amends somewhere to not do it again in the event there is no error on the competitor's part.

Q. Did you ever make a report as to why these particular jobs?

A. I did the first few months, yes.

Q. To whom did you report?

A. At the meeting that we would hold in our office or direct to Mr. Arnett.

Q. Did you continue to get these documents up

(Testimony of Walter R. Waldron.)

to the very time you left the employ of the Downer Company?

A. I don't remember when the last one that I had anything to do with was. Some of these were my associate's, Mr. Lysfjord's. He would be in turn handed those things, too. So I don't remember when.

Q. Part of these documents that have been offered in [249] evidence, those that were handed to Mr. Lysfjord rather than to yourself are included? A. That is right, sir.

Q. You make no distinction between the two in talking about them?

A. No, only the one that I made a take-off on and it wasn't used. I am sure that was an effort I made. But oftentimes they have my initials on the side or if they are in a hurry they don't do that. But if one of the contractors that I associate with or work with gets the job, then it is handed to me to find out why I lost the job.

Q. Were they distributed in equal shares to the various salesmen in the organization?

A. No, I don't think so. It depends on how many of your contractors happen to be successful. When I say your contractors, it is people that we have certain areas to work in and contractors within that area.

Q. Going back a moment to the matter of this first shipment of tile that was delivered to you, do you have any recollection of the means of getting the smaller quantity that you mentioned to your

(Testimony of Walter R. Waldron.)

Los Angeles plant? A. Did I make what?

Q. Have any recollection as to the means whereby that merchandise was transported to your Los Angeles plant.

A. What, incidentally, are you referring [250] to?

Q. You made a statement, I believe, that the merchandise that was covered by this first shipment of tile was in small measure delivered to your Los Angeles plant.

A. Yes. I don't know whether we sent a truck for it or whether they sent it to our shop, but the Water-Land Trucking Company didn't supply the San Bernardino address with the complete shipment, and I believe that explains that extra signature you have on the smaller allotment, that that would have to come out of it at a later date. If the truck and trailer were loaded to capacity, and in lieu of sending it out there, we had it brought in to our warehouse because we could store that small amount here.

Q. Who arranged for that?

A. I think I arranged for it by telephone, but how, whether we sent our truck over or whether they brought it over, I can't remember.

Q. Who signed for it?

A. I don't know. I believe I did. But you will have to show me. Do you have that one, too?

The Court: We will recess until 3:30.

(Short recess.) [251]

(Testimony of Walter R. Waldron.)

The Court: Proceed.

Q. (By Mr. Black): Mr. Waldron, going back for the moment to the early stages of these negotiations with The Flintkote Company in connection with obtaining of a line of tiles from that company, did you have many discussions with Mr. Ragland in an informal way on that general subject, about the possibility of his giving you Flintkote line?

A. I don't believe there was any real discussion, other than to pass the word along, or something of that nature.

Mr. Lysfjord and he worked closely on that, and as far as actual formulating of purchase of the product was concerned, I did have talks with him at my home, I am sure, regarding it. But for other than the possibility it was worked out by he and Lysfjord. They started on that some time before I was in the picture.

Q. At any of the discussions between you and Mr. Ragland, on the subject, do you recall his telling you that he thought there was no possibility of getting established in metropolitan Los Angeles, but that some of the outlying territory might possibly be available?

A. No, I think that was in reverse. I think that my understanding of all these conversations was that they had a need in addition to Los Angeles for outlying coverage. They weren't being adequately covered at that time. [252]

Q. Specifically, do you recall his stating to you, or to you and Mr. Lysfjord, in some of those early

(Testimony of Walter R. Waldron.)

discussions before you had the meetings with his superiors at Flintkote, there might be an opportunity in places like Tucson or Albuquerque or Denver?

A. No, I don't believe I remember such conversation. I had no reason to want anything like that in my mind.

Q. Is it not the fact you made a trip to Phoenix during these early stages, to take a look at that area? A. No, that is not true.

Q. It is not true? A. That is correct.

Q. Did you go to Phoenix for any purpose during the course of these early negotiations?

A. I haven't been in Phoenix until this year.

Q. Never had?

A. As far as I can remember, unless I passed through. But never as a trip to stop in Phoenix for any purpose.

Q. Or to Albuquerque? A. No, sir.

Q. Do you know whether Mr. Lysfjord went there?

A. I don't know for sure. I am quite sure he didn't.

Q. Do you remember a conference with Mr. Ragland at the Atlantic Boulevard office about February 11 or 12, 1952, at which Mr. Ragland said that you weren't supposed to have [253] an office in Los Angeles?

A. He was there—you mean that he was at a meeting where he told us we shouldn't have an office in Los Angeles?

(Testimony of Walter R. Waldron.)

Q. Yes. He came down there alone and saw the two of you.

A. Not in any words that I can remember of like that. As a matter of fact, he had been there many times prior to that late date.

Q. That is a matter in dispute between us.

A. Yes.

Q. I am talking about this particular date and this particular subject. Do you recall such a meeting?

A. No. I recall nothing where he told us we shouldn't be in Los Angeles, when he was alone.

Q. Do you recall discussing with Mr. Ragland, in response to that suggestion, that one of these jobs which you were bidding on was the Wagner Construction job in Torrance?

A. I don't believe I quite follow you, Mr. Black. I don't mean that—I don't get the connection there.

Q. Well, I will be more explicit. In response to Mr. Ragland's statement that you were not supposed to do business in Los Angeles, did you not tell him that one of these jobs that you were working on was the Wagner Construction job in Torrance, and that that was the job you were [254] entitled to do in Los Angeles because that was what you called a closed account?

A. To answer your first question, no. And to answer this question, I don't remember of using any words of a closed account, Mr. Black, because I don't believe there is any contractors operating that can offer a closed account to any subcontractor.

(Testimony of Walter R. Waldron.)

And I have no closed accounts, as you put it. I have accounts where, if I am in line I would get a slight advantage, but I don't believe you could—or I wouldn't dare say there is such a thing as a closed account. [255]

Q. Did you, apart from the language "closed account," did you state in response to that question that the Wagner Construction Company job was a job where you had an inside position or a favored position in getting that work, or words to that effect?

A. Not following any answer of your first question, I am sure that that didn't occur.

Q. What is the situation, or what was the situation in February, 1952, with respect to the Wagner Construction Company and your relations with that company?

A. The only time I mentioned Wagner Construction Company to those people was at the meeting at the Manhattan Supper Club at lunch, and I had a contract, I believe, from them for a certain piece of work, it was quite a nice large job—I am quoting from memory—but I know that I probably told them that I had worked with the Wagner Construction Company for many years, but as far as closed account, I don't believe the word closed account could have possibly been used.

Q. Well, I am asking you whether you said, not at the Manhattan Supper Club meeting but at your own Atlantic Boulevard office, anything about your

(Testimony of Walter R. Waldron.)

having a favored position with respect to that particular account to Mr. Ragland.

A. I did not in response to the question you asked me first.

Q. Or at all? [256]

A. I can't remember at all making that.

Q. Did you have any connection with that company in the way of investment in it or partial ownership of anything—any other inside track to it?

A. Oh, no. I do not have any ownership or investment in that firm and I have never told anyone that I did.

Q. And your relations with it were simply predicated then on the fact that you knew them well and they respected your work, is that right?

A. I believe that would cover it.

Q. That was one of the concerns that you in point of fact were bidding on in Los Angeles at the period I mention, or negotiating for?

A. Well, if they had work to be bid on at that time I am sure I bid on it, but I don't think I remember the exact days.

Q. Do you specifically remember that one of the jobs that you did with the second shipment of Flintkote tile or the second or third shipment of Flintkote tile was a Wagner Construction job at Torrance? A. Yes, I believe we did have one.

Q. And did you also say at that time to Mr. Ragland that the Sharf Constructing Engineers Company, Thrifty Drug Store job at Los Angeles, or is it Mr. Sharf of the Contracting Engineers

(Testimony of Walter R. Waldron.)

Company—am I right on that? Is that the [257] name? Does that mean anything to you?

A. I only recognize the Contracting Engineers Company, but I don't know that particular person.

Q. Did you do a job for the Thrifty Drug Company about that time in Los Angeles?

A. No, I have never done a job for the Contracting Engineers Construction Company since we have been in business.

Q. Do you know the concern?

A. Oh, yes.

Q. Do you know a Mr. Sharf?

A. I do not at the moment. I didn't at that time.

Q. That is S-h-a-r-f, isn't it?

A. I don't know him.

Q. You just don't know him?

A. That is right. There are many people there, by the way, in that firm.

Q. In that concern?

A. It is a large firm. They have a large staff.

Q. And at that time were you or were you not acquainted with them?

A. No, the only person I was acquainted with there was Walter Lavine. I think he is still a member of the firm.

Q. And I understand you correctly, then, that that concern had nothing to do with any of the jobs that you were negotiating for at that time? [258]

Mr. Ackerson: Will you place the time?

Mr. Black: I am talking about February 11th or 12th. I am still taking about the same time.

(Testimony of Walter R. Waldron.)

The Witness: In your reference to that, the work we presented to your firm as clients, no, they didn't.

Q. (By Mr. Black): Or negotiating or attempting to get that work?

A. No, I never negotiated there. If I have done anything it has been strictly a bid, but I have never been successful there and I have never performed a job for Contracting Engineers.

Q. Did you bid on it at that period or thereabouts?

A. I didn't. I don't know if my associate did.

Q. He might have?

A. I don't believe so. I didn't handle the account over there.

Q. You just don't have any recollection one way or the other whether it was mentioned at that time?

A. No, not of negotiating.

Q. Now on the the matter of the first shipment of tile from the Flintkote Company, do you recall where the invoice for that tile was sent to you?

A. I think it was sent to the San Bernardino address.

Q. And do you recall the circumstances and means by which you made payment for that tile? [259] A. Yes.

Mr. Black: Counsel has produced two bank statements which I will ask——

Mr. Ackerson: Do you need the checks in there? You are welcome to them. I am just thinking of encumbering the record, that is all.

(Testimony of Walter R. Waldron.)

Mr. Black: I think the one check is all we need.

Mr. Ackerson: You help yourself.

Mr. Black: Will the Court bear with me while I disencumber the record?

The Court: Surely.

Mr. Black: May we rip these apart, Mr. Ackerson?

Mr. Ackerson: Go right ahead.

Mr. Black: I will ask that this bank statement and canceled check be stapled together as a single exhibit.

The Clerk: Defendants' Exhibit C.

(The document referred to was marked Defendants' Exhibit C for Identification.)

Mr. Black: I will ask that this be marked for identification as Defendants' Exhibit D.

The Clerk: Shall I staple them together?

Mr. Black: Yes, if you please.

The Clerk: Defendants' Exhibit D for Identification.

(The document referred to was marked Defendants' Exhibit D for Identification.) [260]

Q. (By Mr. Black): I now show you, Mr. Waldron, what purports to be a statement of account with the Bell Branch, Bank of America, at Bell, California, and ask you if that is the bank statement with reference to the aabeta company's account at that institution.

A. Yes, that is right.

Q. I invite your attention to the fact that as of

(Testimony of Walter R. Waldron.)

January 30, 1952, there appear two deposits of $3,000. Do you recall the circumstances under which that money was deposited in that account and by whom it was deposited?

A. I believe that I made the deposit.

Q. Do you remember whose funds were used to make it?

A. Yes, sir, Mr. Lysfjord's and myself.

Q. In equal amounts?

A. I believe so at that time.

Q. Do you happen to recall in what form that money was deposited, whether currency or checks or saving account transfers, or what it was?

A. I don't at the moment. I believe—I am not sure but I believe—it was in currency.

Q. I also invite your attention to the fact that there appears on the statement a debit item in the amount of $6,042.02, and attached to this statement is a check in that same amount dated January 31, 1952, in favor of the aabeta [261] company, signed by the company by yourself. Do you recall drawing that check against that Bell account?

A. Yes. [262]

Q. On the date referred to, January 31, 1952?

A. Yes.

Q. I now show you what purports to be a statement of account with the Baseline Branch, Bank of America, San Bernardino, California, for the aabeta co., and ask you if that is, in fact, the bank statement for the month of February, 1952, for that company, with that bank?

(Testimony of Walter R. Waldron.)

A. Yes, that is the one. I see—where do you see the February balance?

Q. On the margin there (indicating).

A. I see. Yes.

Q. The entries are all February, '52, Mr. Waldron. A. I see, yes.

Q. I invite your attention to the fact that in that account appears a deposit of $6,042.02, and I will ask you if that deposit does not, in fact, consist of the check that was drawn on the other account by which, or, which we have just discussed?

A. That is correct.

Q. And that deposit apparently was made, according to the statement on February 1, 1952?

A. Yes, that is correct.

Q. And attached to the statement is a canceled check dated February 1, 1952, in the amount of $6,042.02 in favor of the Flintkote Company, aabeta co. signed by yourself, and [263] I ask you if that is one drawn by you. A. That is correct.

Q. Is that the check that was sent to The Flintkote Company in payment of the invoice for the first shipment of tile? A. I believe it was, yes.

Mr. Black: I will ask these two exhibits be received in evidence.

Mr. Ackerson: No objection.

The Court: Admitted.

(The exhibits heretofore marked Defendants' Exhibits C and D for Identification were received in evidence.)

(Testimony of Walter R. Waldron.)

Mr. Black: Mr. Clerk, may I now have Plaintiffs' Exhibit 16?

The Clerk: Yes, sir.

Q. (By Mr. Black): I now refer you, Mr. Waldron, to your statement of profit and loss, your Exhibit No. 16, covering the period January 1, 1952, to June 30, 1952.

I have a photostat of that, so I can talk from the lectern.

I want to ask you a few questions about it. You will notice that the first item in that statement, Mr. Waldron, is in the amount of $36,006.93, representing, I presume, the gross income from sales. Is that correct? A. Yes, sir. [264]

Q. Now, are you able to testify what operations that covered?

A. That covered—you mean in material or time?

Q. Well, speaking generally, does it cover everything that you or your company did during that period? A. Yes, I am sure it did.

Q. Did you do any work, other than installing acoustical tile, that is reflected by that statement?

A. Yes. There were component materials in all acoustical tile. If you understand that, it takes other materials to create a job, backing, furring, suspension, were and channel and perhaps where it is necessary to have an R fire rating, we have the fire stop behind the acoustical tile. Is that what you had in mind?

Q. Yes. And also did it cover anything, other

(Testimony of Walter R. Waldron.)

than acoustical tile and the connected work with that? Did it cover any other kind of sales and labor, material or anything else?

A. Well, at that time I don't believe so. Since that time we have had—gone into other fields to supplement the loss of acoustical tile, of a competitive nature. But I believe that was the results, or very closely so, of the acoustical tile we had at that time.

Q. Now, search your memory carefully, I am not attempting to dispute you on this at all, but I want your [265] very best recollection on it, as to whether at that time you were not occasionally installing just ordinary insulation material or other types of construction work.

A. I don't believe we entered into the insulating end. I can't remember if we did any of that. If we did, it would be of a minute nature, because we don't have a direct supply of that, either, and it is highly competitive.

Q. Well now, is it possible that you could realize a net profit of over $8,000.00 on two carloads of acoustical tile? A. Yes.

Q. Where did these operations take place that are reflected in this gross income?

A. Los Angeles.

Q. All of them? A. Yes.

Q. There is no San Bernardino work included in this?

A. Oh, no. We had no contacts out there.

(Testimony of Walter R. Waldron.)

Q. Did you do any work in the San Bernardino area during this period?

A. Until your firm shut us down, I was working out there very vigorously.

Q. I mean did you get any jobs that you performed during this period?

A. No. Any commitments I had proposals out on I [266] withdrew out there, because, as you know, their proposals or bids are done during blueprint stage and the materials are not installed in our line until just about the finish of the job, which is three to six to eight to ten months away.

Q. Did you do any job at all in the San Bernardino area with the Flintkote tile? A. No.

Q. None of them?

A. As far as I can remember, I don't remember any.

Q. Tell me about the Arthur Murray job that has come up in the course of these depositions. Did you do that work?

A. Yes. The California Decorating Company held the contract. We, in turn, installed some acoustical tile there, if that is what you are referring to. But we bought that from a small amount of an odd size from the L. A. Downer Company, Riverside, and the difference in material we used was a residue from a firm that used to be English & Lauer that had the J-M—Johns-Manville—line at that time, and they discontinued the line and the California Decorating Company bought up the difference, what-

(Testimony of Walter R. Waldron.)

ever they had left. The odds and ends, and we used that in the Arthur Murray job.

Q. When was that job done?

A. During the time of that first deposition.

Q. Did you make any profit on it? [267]

A. Yes, but that was not just acoustical tile, Mr. Black. That was a joint venture between the aabeta co. and the California Decorating Company, and that was complete alterations within the entire structure. It was a $25,000.00 contract of alterations and decorations, you understand.

Q. Yes. But that was aabeta co. work?

A. That is right, in a way, except that happened after this, if you are referring to this.

Q. It happened after this period?

A. After this six months, yes.

Q. That is what I misunderstood you about. I thought you said it was during this period.

You mean you got the job, but it wasn't performed, is that correct?

A. We were performing it during the time of that first deposition. That would give you roughly the date.

Q. I see.

Mr. Ackerson: October of '52.

Q. (By Mr. Black): It comes after the period of this, covered by this statement (indicating)?

A. That is right.

Q. There is no San Bernardino work, then, reflected in this at all?

A. I don't believe there is.

(Testimony of Walter R. Waldron.)

Q. Now, the item, cost of sales, tell me what that [268] embraces?

A. Which one are you referring to?

Q. The second item on the statement, fifteen thousand—my photostat is so smudgy I can't read it. Read me that figure, please.

A. Cost of sales, sir?

Q. Yes, please. A. $15,552.94.

Q. What does that consist of?

A. That is evidently labor and materials. I don't —you could have me there, because I don't keep the books and I rarely look at them. Mr. Lysfjord could explain it more, but I believe that would be the total cost of labor and material, trucking and merchandise items and perhaps—I don't know whether it includes overhead—I guess not, because there are some other items here.

Q. That is what puzzled me. Sometimes the labor cost is in that and sometimes it merely reflects the cost of materials and commissions and I was wondering which in this case, if you know?

A. I don't know at the moment.

Q. Because you will notice the operating expense, you show an item of wages, what is it, $6,638.18? A. That is right.

Q. Whose wages are reflected in that figure? [269]

A. Well, I believe that is mechanics, installation mechanics and trucking and miscellaneous labor.

Q. And those would be the people you paid to install tile, is that right? A. I believe so.

(Testimony of Walter R. Waldron.)

Q. You didn't have any office help that you were paying a regular salary to at that time?

A. No, we didn't at that time.

Q. Was anybody else on your regular payroll, drawing a salary for any purpose?

A. No, sir. Truck drivers and the men in the field at that time were all we had.

Q. That would be included, however, in the wages? A. I believe it would, yes. [270]

Q. In any event your total operations showed a profit for the period of something over $8,000?

A. That is correct.

Q. During that period did you actually purchase any tile from any other source than The Flintkote Company?

A. There again I imagine we did, if we could get it, but I didn't do the purchasing. I imagine we bought whatever we could get, Mr. Black, but as to amounts, I don't know.

Q. Well, actually, the second and third shipments of Flintkote tile were considerably less than a carload, were they not, as you recall?

A. Yes. I don't remember the exact amounts but I think that is so.

Q. The total over-all was about 1⅓ carloads, wasn't it?

A. I imagine that, or 1½, something like that.

Q. I take it then you don't really know precisely what jobs did go to make up this gross income on this statement?

(Testimony of Walter R. Waldron.)

A. Yes, any job we did up to that day and was ompleted.

Q. You seem to be uncertain as to whether it oes or does not reflect jobs performed with peole's tile other than The Flintkote Company tile) any extent?

A. I am pretty sure, Mr. Black, unless we eeded some [271] special size that we didn't have ı stock, why this would be Flintkote tile. What I ıean by special size is over 12 by 12, like 24 by 24, r something of that nature. I believe you supplied s with what we needed of that size at that time. So believe that this would be 90 per cent or 98 per ent Flintkote tile. I thought it was all. I still don't now for sure.

Q. You still don't know positively. Did Mr. Lysjord know that?

A. He could probably give you a closer answer ıan I because they have been compiling some of ıat information for you in the last week or two.

Q. Let me go back to one other question preminarily: Do you happen to know how much floor pace is needed to store a carload of tile, of standrd size?

A. Well, it would have to be equal to 6 by 60 eet long, or 70—I am quoting the space in a car, he actual square feet I never figured out, if you anted to square it—but a car is 8 feet wide, I beeve, by about 60 feet long, and eight feet high inide, and whatever volume that amounts to would be ne carload of tile, I believe.

(Testimony of Walter R. Waldron.)

Q. How many tiers high can you safely stow this material in a warehouse?

A. I don't know. It depends on how well you reach it, but if you can reach it, I don't know that that is—I don't think there is a limit except when you get to the load limit [272] of crushing those on the bottom.

Q. In other words, the cartons are such that they won't crush themselves by stacking onto an indefinite number of tiers, am I right on that?

A. I don't believe we would have to worry about that in a warehouse such as are being used now, but you can stack it up 15 feet high.

Q. What are the dimensions of a carton of tile approximately, a single carton?

A. They are roughly 13 inches wide by 24—I have never measured one, by the way—about 2 feet six long and about 15 or 16 inches deep.

Q. Do cartons vary in size depending on the size of the tile?

A. No, I think they hold pretty uniform. They just put fewer in if it is a thicker tile.

Q. Do you recall the exact dimensions of the warehouse you had at Bell?

A. I don't at the moment, but it could be had.

Q. Can you give me an approximation?

A. No. I think we had a thousand square feet of space, but how it was dimensioned I don't know at the moment.

Q. How much of that was used in office space, if any?

(Testimony of Walter R. Waldron.)

A. Oh, about 10 by 15 or something like that, I imagine.

Q. And how high was that building, the interior? [273]

A. About nine feet, I believe, or eight or nine, somewhere in there.

Q. When did you acquire this second Los Angeles warehouse that I think was mentioned in your testimony?

A. In anticipation of our next carload of material, we acquired one—I don't remember the street but it is east of our warehouse, a half a mile or so along the river—but it was a little short inroad there, and I don't remember what the name of the street is.

Q. When did you acquire it?

A. I don't remember.

Q. Did you take a lease on it?

A. I don't think so. I think we just rented that.

Q. Do you have any writing or document that will refresh your recollection on when that was acquired?

A. I believe we paid by check so I think we would have those.

Q. Would you look that up and give it to your counsel so that we can fix the date of that?

A. Yes.

Q. Now how big was the warehouse at San Bernardino?

A. There I will guess again, but it was several times larger than the one we had in Los Angeles. I

(Testimony of Walter R. Waldron.)

would say it was 25 feet wide or 30 feet wide by 50 feet or perhaps 60 feet deep. [274]

Q. And how high was the ceiling in that storage room? A. I think it was about 10 feet.

Q. Now I think you said that you were under the impression that it cost you more to have a carload shipment delivered to you in two places?

A. I understand that is true. That is called stop-over.

Q. How do you understand that?

A. That is what we are doing now. If we have a car stop, it costs more money than if we deliver it in one place. I don't know just what they call it, in one routing.

Q. Did you ever make any inquiry of anybody at the Flintkote Company, whether they would charge you more to split a carload in two deliveries than to put it in one place?

A. No, but they are lcl lots and indicated as such on their price sheets.

Q. This is not an lcl lot. I am talking about ordering a car. Suppose you ordered a car and after it arrived on the water carrier at the dock, suppose you wanted part of that delivered to a job and part at your place of business, do I understand that you would have to pay more for that than you would if it all went to your warehouse first?

A. That is what I thought at the time and I believe it does.

Q. Did you ever make any inquiry of Flintkote

(Testimony of Walter R. Waldron.)

whether [275] it would cost you more in this particular connection?

A. Well, we had their information to go by, Mr. Black, and it states cars or lcl.

Q. This is not a split car, it is a shipment to yourselves?

The Court: What do you mean by lcl?

The Witness: Less than carload lots.

Q. (By Mr. Black): They quoted a price to you, a delivered price, did they not? You didn't have to pay for your transportation to your point of destination, did you? A. Yes, that is true.

Q. That is correct? A. That is right.

Q. So far as you know, you never made any personal inquiry of anybody at Flintkote as to whether it would cost you more or the same to have that car delivered to you in two places rather than one?

A. Except their stationery or their price list. I don't know if I made any inquiry, no. I don't know. But it is very plain that stop-overs or lcls are changed in price in the delivery or the cost of the material.

Q. And you interpreted that to be a less than carload deal or a stop-over?

A. Yes, it works that way with us now. If we stop a [276] car some place they charge us more although we buy the entire car. That still happens. [277]

Q. Then I understand you that none of this material that was delivered to you at San Bernardino was actually used by you in that area?

(Testimony of Walter R. Waldron.)

A. That is correct.

Q. When was it hauled back to Los Angeles?

A. I don't know the exact dates there. I say, we had a superintendent and I worked in the field, so I don't know when. But eventually we brought it all or sold it to someone out there, rather than installing it.

Q. Do you know whether any part of it was hauled back to Los Angeles before the termination meeting?

A. No, I am quite sure it wasn't, Mr. Black.

Q. What makes you quite sure about it, Mr. Waldron?

A. We hadn't anything to put it on here. We didn't have any job at the moment that required any quantity, and if you are referring to the job that we did for the Owens Roofing Company, that material was picked up or it was delivered from the Waterland Truck Company. That was not delivered to San Bernardino, because of overload, or it was more than their trucks would haul at that time.

Q. Now, I call your attention to the fact your deposition in October, 1952, page 50, the question asked:

"Q. Now, you say you do not know when you actually hauled some of that Flintkote material back to Los Angeles but that you did haul some of [278] it. Now, isn't it true that some of that hauling back occurred before Flintkote terminated you?

"A. That is a possibility."

Do you recall giving that answer?

(Testimony of Walter R. Waldron.)

A. That is very—I don't know that I didn't. I am sure I did, but I didn't know of it, and all the inquiries I can find at the moment, we didn't.

Q. You didn't have personal charge of hauling it back, or did you?

A. No, I didn't. I was rarely in my office.

Q. Who would have charge of that operation?

A. Well, at that time our superintendent, a Mr. Yeomans.

Q. When did he start working for your company?

A. Right about the time we opened, about the first of the year there.

Q. In what capacity was he employed?

A. We had planned for him to become a partner, but he never did.

Q. Where did he work during the early stages of your operations?

A. Well, he was arranging for scaffolding, planking, nails, supply houses, opening accounts for supplies, and that sort of thing during the early stages.

Q. At which office? [279] A. Bell.

Q. Entirely there? A. That is right.

Q. Did he have anything to do with the San Bernardino operations?

A. No. We hadn't anything out there for him to be interested in at that moment.

Q. Was he ever out there at all during the course of your connection with Flintkote, before the termination date?

(Testimony of Walter R. Waldron.)

A. Not in his official capacity. He was out there and helped do the alterations in the office area we were trying to fix up one day.

Q. What alterations were actually required at San Bernardino?

A. To close up an area and make an office out of it.

Q. What was the nature of that building when you rented it?

A. It was—you mean the construction? I believe it was sheet metal roofing or tar paper roofing, a frame building, and lined inside with a fiberboard.

It has been used as some kind of a night operation or gambling place, or something of that nature prior to that, because we had trouble with the telephone out there.

They didn't want to put a telephone in there, or something, so I had to go over and get all that cleared up. [280]

Q. During the period that you were installing these jobs that were done with the Flintkote tile, did you and your partner personally do any of the installing work yourself?

A. The first few jobs we worked on, yes.

Q. Which jobs were those, if you remember, by description or name?

A. The first one I worked on was Owens Roofing.

Q. Was that sort of a special job that you talked about, that came to you more or less by accident?

A. No, there was no accident to it. It was——

(Testimony of Walter R. Waldron.)

Q. Didn't you just happen to be in the Flintkote office when the thing come up?

A. How did you happen to say I would happen to be in the Flintkote office, Mr. Black?

Q. You had reason to be there in connection with the company?

A. Why do you bring that up? What is the reason for that question, Mr. Black?

Q. I am just asking you——

The Court: Mr. Witness——

The Witness: I am sorry, sir.

The Court: ——we can't have witnesses inquiring into the techniques of the lawyers.

Mr. Ackerson: I think the question assumes a fact not in evidence, because it is cross-examination. [281]

Mr. Black: I will put it this way then:

Q. (By Mr. Black): Didn't you happen to be with Mr. Ragland at the Flintkote office when that matter first came up?

A. What matter are you referring to, sir?

Q. The possibility of getting this Owens Roofing Company job?

A. No. My last time——

Q. Try to refresh your recollection.

Mr. Ackerson: Let the witness finish.

Q. (By Mr. Black): You may finish and explain. Counsel was right. Go ahead and explain your answer.

A. Thanks for allowing me the informal way I talk about this. You want to know how I arrived

(Testimony of Walter R. Waldron.)

at the—getting the contract for the Owens Roofing job? Do I gather that as being your question, sir?

Q. Yes, basically so. Then I want to ask you a question about it, when you tell me.

A. To get the job, Bob let me know that they had an inquiry through one of their roofing salesmen, that they wanted to have an acoustical tile treatment done in their office, and asked me to go over and find out about it, so I did.

When I told the man Bob sent me over, he said, "That is fine." [282] I told the man, and again I am instructed to say who. That was Mr. McLane—McLane, I believe, is the name—Jim, a young fellow.

He was interested in this work. I was interested in doing it for him. I told him Bob sent me.

He said, "Well, in the event that they recommend you, why, then we can go ahead."

So they gave me a job and I was rather happy about it because I didn't want to lose the first job Bob had pointed out to me. And we made the installation. Is that——

Q. Well, I will ask you if it isn't a fact that you and Mr. Ragland happened to be at the Flintkote office together when the inquiry from Owens Roofing came in and was discussed in your presence by some of the Flintkote people, and that you asked Ragland if you couldn't take a whack at that job, you weren't started yet and it was an installation job basically, and you could earn a little money by doing that, and

(Testimony of Walter R. Waldron.)

he said, "Go ahead and see them"? Isn't that about what happened? A. That is entirely wrong.

Q. Nothing of that sort occurred at all?

A. Nothing of that sort happened.

Q. In any event, Mr. Ragland it was that told you to go ahead. But you think the inquiry was initiated by him and not by you, as to whether you could take the job? [283]

A. Inquiry where, Mr. Black?

Q. As to the application for the job, whether it was not suggested by you, as a result of overhearing some discussion between the Flintkote people and learning that the job was available?

A. Oh, no, sir.

Q. You don't think it started at the Flintkote office at all? A. No, sir.

Q. Where were you when you first heard about it?

A. I was either at my home, where I have a desk and work there, or at my office in Los Angeles.

Q. Now, how often were you at the Atlantic Boulevard office between the period, say, December 11th and February 15th?

A. December 11th and February 15th. After February—after January 15th I had gotten the warehousing and telephone and bank work finished in San Bernardino. I was in the L.A. office probably one day a week, two days a week, three days a week, would just stop in for a few minutes about the mail.

Q. How often were you there, say, between De-

(Testimony of Walter R. Waldron.)

cember 11th and the time when you first went to San Bernardino?

A. Well, my time in San Bernardino started right around December 27th, 28th, somewhere in there. [284]

I made inquiries on the real estate dealers and I called some by phone, and had them looking for warehousing out there.

I don't know if I stayed out there any length of time, other than a day or two at a time.

Q. During that period did you make frequent visits to the office or warehouse at Los Angeles?

A. Yes, I would be in town here perhaps every night. Maybe I would go out there during the day and come back at night. It is an hour and a half or so drive, you know.

I do that a great deal. My time out there over night was rather rare, but I would be out there a great deal during the week, maybe Monday, perhaps Tuesday, and then I wouldn't go out again until Wednesday or Thursday or Friday. [285]

Q. Would it be your practice to go direct from your home out to San Bernardino?

A. I often have.

Q. And how long does it take you to drive out there?

A. An hour and a half to two hours, roughly.

Q. What would you be doing at the Los Angeles office before your telephone was installed there?

A. Arranging materials, scaffolds, equipment, I think we bought a truck, I think we bought some

(Testimony of Walter R. Waldron.)

steel scaffolds—I think our early records show all that, don't they?

Q. Did you install some acoustical tile in the office at Los Angeles? A. Yes.

Q. What tile was that?

A. I don't remember.

Q. Where did you get it?

A. I don't remember except Bill installed it, our superintendent.

Q. Do you remember whether it was Flintkote tile or somebody else's tile?

A. No, I had no reason to use any other tile. It might have been Flintkote, but I don't know whether we installed it at that time or not.

Q. Do you recall when that was done?

A. At the moment, I don't, no. [286]

Q. Did you do it personally?

A. I didn't, no.

Q. Did you superintend it?

A. Yes, I think he put it in.

Mr. Askerson: I don't think you heard the question.

Q. (By Mr. Black): Did you oversee the job? Did you superintend the job?

A. No, I wasn't there when it went in.

Q. It was a very simple job, was it not?

A. I rather thought so.

Q. And you had no part of doing that yourself?

A. No.

Q. And that doesn't require your personal presence at the Los Angeles office? A. No.

(Testimony of Walter R. Waldron.)

Q. How long does it take for you to drive from your home to the Los Angeles office in Bell?

A. At that time about a half an hour under good traffic conditions.

Q. And as I understand it, that location is substantially at the intersection of Florence and Atlantic Boulevard?

A. Rather close, a half block or a block away.

Q. And how far away from that location is the other warehouse that you later established in the Los Angeles area?

A. I don't know in miles or yards. It would take [287] probably three or four or five minutes to drive to it.

Q. I think that we talked about the date of that thing and you were uncertain as to when that was acquired, and you would undertake to get me a memorandum if you had it. But I will ask you this, if you can recall from memory, was that second Los Angeles warehouse obtained before the termination of your relations with Flintkote?

A. I don't know. I don't know right now. I think it was.

Mr. Ackerson: You are talking about the one on the river?

Mr. Black: The one on the river that the witness mentioned.

Q. You think it was acquired before the termination date? A. I couldn't be sure of that.

Q. What was the capacity of that place?

(Testimony of Walter R. Waldron.)

A. Oh, that was quite large, I would say it was almost as large as this room.

Q. How long did you keep it?

A. Oh, three or four months, or some time. We had trouble with water there. When it rained, the water would run all through the place, so that wasn't good on acoustical tile.

Q. Did you ever use it to store any acoustical tile? A. Oh, yes, we had some in there. [288]

Q. And part of the Flintkote lot was stored in that place, wasn't it?

A. It may have been. If we still had it after the termination or if we got it after the termination, then we probably stored the material we had on hand in there or any other we purchased.

Q. You say you probably did. Your recollection isn't clear on that, is it?

A. We couldn't store any in our Bell area because it would hardly carry the scaffolding and gear that is necessary to carry on this kind of work, except a few cartons for emergency use, 10 cartons perhaps. So any material we had that wasn't in the San Bernardino warehouse would have to be in there.

Mr. Black: May I confer with my associate just a moment?

(Conference between counsel.)

Q. (By Mr. Black): On the matter of working San Bernardino, I believe that you testified that rather than install the tile yourself after you

(Testimony of Walter R. Waldron.)

were not going to be out there, you sold part of that to somebody else?

A. I don't know that we did. I only mentioned that it could have been a possibility, that someone may have wanted some. I don't know.

Q. Because it was my impression that the tile that was [289] supplied to you beyond this first shipment was limited to what you had actual contracts for and those were contracts to install, not merely sales contracts, were they not?

A. You are speaking now of the commitments I submitted in your firm's office after the severance?

Q. Yes.

A. That is correct. Those were contracts that we had and they were odd types of material, I believe. They were 24 by 24, which we didn't have in the first car. Now I know some of it was, and it is altogether possible that all of it was.

Q. And those quantities that you needed, they took into account the first car, of course, didn't they? I mean to say, when your termination occurred and Flintkote announced to you that they would give you enough tile to complete the jobs for which you had firm contracts, that of course took into account what you already had on hand from the first shipment, did it not?

A. Well, those would have been, Mr. Black—I believe you have a hospital job mentioned there, do you?

Q. I don't recall.

(Testimony of Walter R. Waldron.)

A. At Van Nuys. That would be a slow burn finish. That was not in the first car.

Q. I am not quite clear, but speaking generally, when the termination occurred and the Flintkote people announced to [290] you that they would supply you with tile sufficient to complete your firm contracts that you had, those quantities took into account the first car that had already been sent to you, didn't it?

A. I don't remember. Do you have the sizes of tile?

Q. I know what was shipped to you, of course, from the exhibits.

Mr. Ackerson: I think the witness wants the notations.

Mr. Doty: That is not the one that is in evidence.

Mr. Black: This is a copy of it.

Mr. Ackerson: Why don't you use that for reference?

Mr. Black: I think this is the same as one of the exhibits. We won't at the moment take the time to look for it. [291]

Mr. Doty: That is Plaintiffs' Exhibit 14, that is what it is a copy of.

The Witness: You will not, Mr. Black, that on this item it is 24x24 inch tile. That is quite a large size. And on the Valley Hospital it says it is slow burn, which is a special finish that we didn't have in the first order. The first order was strictly an order of no purpose other than to satisfy Bob that

(Testimony of Walter R. Waldron.)

the plant was going to shut dow and he didn't want us to get caught short.

This is all 24x24 one-half inch acoustical tile—I don't know what the S.F. means; maybe standard finish or some other special finish—but we didn't have this type of tile in the first car, you understand.

Mr. Black: Yes, I understand.

The Witness: And that is probably—I don't know what your ultimate thought was, if this was a part of the other material or the jobs were a part of the other material, this one wouldn't be, and that wouldn't be, this one might be, this one might be, because if there was any regular pattern or regular finishing it was probably put in out of the original if we had it left when the job was ready.

Mr. Ackerson: Mr. Black, Mr. Doty tells me that that is Plaintiffs' Exhibit 14 and that it is only in for identification.

Mr. Doty: That is right. It is not in evidence.

Mr. Ackerson: I am not objecting to your using it, however. [292]

Q. (By Mr. Black): I am still a little puzzled as to why, if you did sell the tile in San Bernardino to somebody else, you didn't go ahead and install it yourself and take the additional profit on it.

Mr. Ackerson: Just a minute.

The Witness: I didn't say we installed any, Mr. Black.

Q. (By Mr. Black): What is it?

A. I didn't say we installed any, sold any, Mr.

(Testimony of Walter R. Waldron.)

Black. Maybe a possibility—I don't know who we would sell it to. I know if we did, that is where it went to.

Q. It all boils down to you don't know?

A. As far as sales of material?

Q. Yes.

A. No. People come and buy a carton once in a while.

Mr. Black: I think that is all.

The Court: Does that conclude the cross-examination?

Mr. Black: Yes.

Mr. Ackerson: I won't have anything extensive, Your Honor.

The Court: Well, if it is brief, let's get it over with and we will start with a new witness on Monday.

Mr. Ackerson: It will be very brief. In fact, I may have none. May I just look over these notes?

The Court: Yes. [293]

Redirect Examination

By Mr. Ackerson:

Q. Mr. Waldron, Mr. Black asked you concerning the small shipment you signed for. I call your attention to the light handwriting on Defendants' Exhibit B, which reads "To fill shortage on orig-

(Testimony of Walter R. Waldron.)

inal shipment." Does that refresh your recollection any more than what you told Mr. Black?

A. Yes. Their truck and trailer didn't hold the amount ordered and this was signed, to be delivered at a later date.

Q. Do you know where that was delivered, the small order, the shortage?

A. This was delivered to the Bell warehouse. However, it was signed at the time the original truck and delivery was made in San Bernardino.

Q. At the time you personally performed this Owens Roofing job, was Mr. Lysfjord still with the Downer Company, do you know?

A. Well, he had severed, I remember, but they had asked him to stay on for some time. I forget just what amount of time more he had planned to stay. But it wasn't long there, because it was just a cleanup, stayover, you know, about clairfying of take-offs on jobs in progress and any changes in addendums out or alternates that would affect his work, for a few days. [294]

Q. So you don't know for certain whether he was still with Downer Company while you were performing this job or whether he had severed relations?

A. I think he was there. I believe we did that—I think he held over there until about the 10th of February, and I think we did that before February 10th.

Q. Who helped you with the job, if anybody?

A. Bill Yeomans, our superintendent.

Mr. Ackerson: That is all, Your Honor.

The Court: Any recross?

Mr. Black: No recross.

(Witness excused.)

The Court: What is your estimate now, Mr. Ackerson, of the time required to complete presentation of your case?

Mr. Ackerson: Your Honor, I don't believe I will take over a couple of days; I doubt it. I am planning on shortening the other plaintiff's testimony without covering what I have covered here any more than is necessary. I hate to make a broad estimate, but I would try very hard to finish plaintiff's case in another couple of days.

The Court: I am trying to figure how we can integrate the business of the Court, so your estimate——

Mr. Ackerson: It may be three days. I will try to make it in two.

The Court: How long do you think you will take, [295] Mr. Black?

Mr. Black: It is a little difficult to predict, because some of these matters may not require more than one witness, but without having plaintiffs' case in toto before me, it is a little hard for me to give an intelligent estimate.

I would guess two or three days would normally cover it. We will have quite a few witnesses, presumably have them, but some of them ought to be quite short, as they are merely cumulative.

Mr. Ackerson: I might add I do anticipate—I

don't say extended cross-examination on Mr. Black's witnesses, insofar as I know who they are going to be, Mr. Black, but this is the usual situation where sometimes cross-examination brings out additional facts. I just want Your Honor to be apprised of the fact I intend to utilize it.

The Court: The Court isn't trying to rush you. I am just asking for information. I would appreciate your keeping the presentation down to as brief a time as is commensurate with adequate presentation of your positions.

We will not be able to hear this case on a Monday morning, due the regular motion calendar of the Court.

We will now adjourn the matter until Monday afternoon at 2:00 o'clock.

(Whereupon, at 4:45 o'clock p.m., Friday, May 6, 1955, an adjournment was taken to Monday, May 9, 1955, at 2:00 p.m.) [296]

Monday, May 9, 1955—2:15 P.M.

The Court: Everyone is present. You may proceed.

Mr. Ackerson: Thank you. Your Honor please, during the last session I think counsel for the respective parties agreed to submit a brief.

I have a copy of the brief requested by the defendant and I want to apologize, I haven't had time to put in the exhibit in the second copy of the brief. I wonder if Your Honor will bear with me——

The Court: All right. That is the copy I work

from, that the Court works from. The other is the master copy that reposes in the Court's file. I can use the Court's file if it comes down to it.

Mr. Ackerson: Thank you, Your Honor. Copy of the plaintiffs' brief has been served upon the defendant and I have received a copy of their corresponding brief.

Mr. Black: We have delivered ours to the clerk, if the Court please.

The Court: Yes. I am sorry to keep you waiting, gentlemen. We had a 1:30 calendar and had some tag ends to be taken care of in chambers.

Mr. Ackerson: If Your Honor please, I have some witnesses here in response to subpoena duces tecums, and I think probably they are the next order of the day. [298]

The Court: You put your case on in your order.

Mr. Ackerson: May I have the representative of the R. E. Howard Company come forward.

Mr. Howard, will you take the stand up here and be sworn.

RICHARD E. HOWARD

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated. Your full name, sir?

The Witness: Richard E. Howard.

The Court: Mr. Howard, this is a large room and voices don't carry very well in here. People seated over there in the jury box are the ones who

(Testimony of Richard E. Howard.)

must hear you, so talk to them as if you are trying to sell them a tile job, in a good, loud voice.

The Witness: All right.

Direct Examination

By Mr. Ackerson:

Q. Mr. Howard, you are president of the R. E. Howard Company, are you?

A. Vice president.

Q. Vice president. And you were asked to bring certain documents here today in response to a subpoena duces tecum. Do you have those documents, Mr. Howard? [299]

A. The majority of them. There is one or two we don't have of the list.

Mr. Black: I am sorry, Mr. Howard. I would like to hear you, too, if I may, please. ....

The Witness: I have the majority of them. There is one or two missing from a previous list. Of course, I only have a small part of the Exhibit A.

Q. (By Mr. Ackerson): I understand that, but you have brought all the documents——

A. Yes.

Q. ——with one or two exceptions?

A. That is right.

Q. You have that applied to this list in Exhibit A? A. That is right.

Q. I was asking particularly these itemized numbered documents from No. 1 to No. 48, and your answer applies to those documents.

(Testimony of Richard E. Howard.)

A. That is right, yes.

Q. Now, also I asked for manufacturers' price lists. Did you bring those, Mr. Howard?

A. The current? No. And I don't have any of the old ones.

Q. You have no manufacturers' price lists?

A. No, I don't.

Q. Do you have a copy of the unit price list as it [300] relates to the sale of tile by acoustical contractors?

A. No, I don't. We don't use them.

Q. You did not have such a copy in your files?

A. Probably did back in 1950-51.

Q. But you do not have one now?

A. No. [301]

Q. And you brought all such correspondence or other documents relating to either manufacturers' price lists or unit price lists which you have?

A. Which I don't have.

Q. You had none? You had none of the items, the unnumbered items? A. No.

Mr. Ackerson: Very well, Mr. Howard.

Q. And those documents are the documents which I have in my hand? A. That is right.

Q. Mr. Howard, are they segregated as to these numbers?

A. Yes, each job has a name which corresponds with those numbers there, or names on those.

Mr. Ackerson: Now, if the Court please, I wonder if for convenience sake we could have this marked for identification Plaintiffs' next in order

(Testimony of Richard E. Howard.)

with the idea that we might subdivide them as A, B, C, D, later on?

The Court: Yes.

Mr. Ackerson: Will you mark that Plaintiffs' Exhibit for Identification next in order?

The Clerk: Plaintiffs' Exhibit 29 for Identification.

(The folder referred to was marked Plaintiffs' Exhibit No. 29 for Identification.) [302]

Mr. Ackerson: Thank you, Mr. Howard. That is all.

Do you have any questions, Mr. Black?

Mr. Black: No questions.

(Witness excused.)

Mr. Ackerson: Will the witness for the Paul H. Denton Company please step forward?

LEE L. ARMSTRONG

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Lee L. Armstrong.

Direct Examination

By Mr. Ackerson:

Q. Mr. Armstrong, you are appearing today in response to a subpoena duces tecum listing certain documents which were to be supplied?

A. Yes.

(Testimony of Lee L. Armstrong.)

Q. And do you have those documents with you?

A. Yes, I do.

Q. Will you produce them?

A. (Producing documents.)

Q. Mr. Armstrong, can you tell me generally what these documents are which you have produced?

A. Well, there are six of the named jobs there that the Paul H. Denton Company installed. [303]

Q. And the jobs that you are referring to are the numbered requests on the subpoena duces tecum, that is, Nos. 1 to 48, inclusive?

A. Six of those is all we had anything to do with.

Q. That is all you performed?

A. That is right.

Q. And they are all the documents you had relating to the 48 jobs? A. That is right.

Q. Now, Mr. Armstrong, there were three other additional requests. Did you bring any manufacturers' price lists in these documents?

A. No, I didn't.

Q. Do you have any?

A. Not to my knowledge, we don't.

Q. What acoustical tile do you handle?

A. Armstrong Cushion Tone and—that is about it.

Q. Do you handle another line in addition to that? A. We have.

Q. What was that? A. Pioneer-Flintkote.

Q. When did you cease handling Pioneer-Flintkote?

(Testimony of Lee L. Armstrong.)

A. I would say in '51, somewhere around there.

Q. It might have been in '52?

A. It might have been. [304]

Q. Did Flintkote supply you with their manufacturers' price list at the time you handled their tile?

A. They may have at that time but I don't know where it is now.

Q. And does Armstrong?

A. I believe we had some of theirs, too.

Q. But you do not have any now, that is your answer? A. No, I don't.

Q. What about the second request, Mr. Armstrong, relating to the unit or other price list used, circulated or in any manner utilized or referred to in formulating bids for the sale of acoustical tile by contractors?

A. We don't have any unit price lists.

Q. Did you ever have any? A. No.

Q. Your statement is that you never did utilize such a list? A. No.

Q. And you have none in your possession at the present time? A. No, I don't.

Q. So that the total amount of documents here relate to the five or six jobs enumerated on the subpoena duces tecum which Acoustics, Inc., performed? A. Yes. [305]

Mr. Ackerson: May we have this series of documents contained in one folder marked with the same understanding and marked Plaintiffs' Exhibit next in order?

The Court: Yes.

The Clerk: Plaintiffs' 30 for Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 30 for Identification.)

Mr. Ackerson: That is all, Mr. Armstrong. Thank you.

Mr. Black: Just one question that I wanted to ask, please.

Cross-Examination

By Mr. Black:

Q. Mr. Armstrong, you are not at all sure of the date when you stopped dealing with Flintkote products? A. No, I am not.

Q. It could in fact have been considerably earlier than 1952, could it not?

A. It could be, yes. It could be in 1950 or '49.

Q. My impression is it was quite a bit earlier than '52. I don't have the exact dates from our records.

A. I am sure it was. I am sure it was earlier.

Redirect Examination

By Mr. Ackerson:

Q. It could have been as late as February, 1952, could it not? You are not saying it as a fact that it was before February [306] '52, are you?

A. It would be before that, yes.

Q. You are positive of that?

A. Quite positive.

Mr. Ackerson: Very well. That is all.

(Witness excused.) [307]

Mr. Ackerson: May we have the representative of Sound Control Company step forward, please.

ROBERT RANDALL SMITH

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated. Your full name, sir?

The Witness: Robert Randall Smith.

Direct Examination

By Mr. Ackerson:

Q. Will you state your name a little louder?

A. Robert Randall Smith.

Q. Mr. Smith, you are appearing here today in response to a subpoena duces tecum requiring you to bring along certain documents, are you?

A. Yes, sir.

Q. And those documents are numbered 1 to 48. Do you have those documents? A. Yes, sir.

Q. They are contained in this folder (indicating)? A. Yes, sir.

Q. In this folder are documents contained required by the unnumbered paragraphs, namely, do you have any manufacturers' price lists?

A. No, sir. [308]

Q. What is your position with your company?

A. You might say assistant sales manager.

Q. Did you ever have such manufacturers' price lists?

(Testimony of Robert Randall Smith.)

A. We have manufacturers' price lists, of course, but I don't have them for that period, that I know of.

Q. You don't have them for the period January 1, 1950, to and including January 1, 1953?

A. No, sir.

Q. You have no such price lists that were in effect during that period?

A. Not to my knowledge.

Q. Does this envelope that you produced, Mr. Smith, contain any unit list prices, or, price lists, I should say, that were used or considered by acoustical tile contractors during the period January 1, 1950, to January 1, 1953?

A. No, it doesn't.

Q. Have you ever had any such price lists?

A. From time to time there has been a price list we have used in our firm, but we don't have one now.

Q. You don't have any? A. No.

Q. So they are not included? A. No, sir.

Q. Is there any correspondence relating to—I will read the last: [309]

"All correspondence or other documents relating to estimating or price practices sent to or received from any other member of the Acoustical Tile Contractors Association between the same dates, January 1, 1950, and January 1, 1953"?

A. There is nothing in that folder (indicating).

Q. Is it your statement that as of today there are no such documents in your files?

(Testimony of Robert Randall Smith.)

A. Yes, sir.

Mr. Ackerson: I will ask that this folder be marked Plaintiffs' for identification next in order, with the same understanding of subdivisions later.

The Clerk: Plaintiffs' 31 for identification.

(The folder referred to was marked Plaintiffs' Exhibit 31 for identification.)

Q. (By Mr. Ackerson): Mr. Smith, with respect to the item of—the second numbered item, relating to acoustical tile contractors' price lists, I believe you stated you have had such documents and used them? A. Yes, I believe I did.

Q. Your statement is merely they are not in the files of your company at the present time?

A. That is true.

Mr. Ackerson: That is all, Mr. Smith.

(Witness excused.) [310]

Mr. Ackerson: May we have the representative of Coast Insulating Products Company?

GUSTAV J. KRAUSE

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated, sir. Your full name, please, sir?

The Witness: Gustav J. Krause.

The Court: We can hardly hear you, Mr. Krause.

(Testimony of Gustav J. Krause.)

We are supposed to hear everything you say. Boom out a little bit.

The Witness: Yes, your Honor.

Direct Examination

By Mr. Ackerson:

Q. Your name is Mr. Gustav Krause?

A. That is right, sir.

Q. What is your position with the Coast Company? A. Vice president.

Q. Mr. Krause, you appear here today in response to a subpoena duces tecum requesting you to produce certain documents on behalf of your company, is that correct?

A. That is correct, sir.

Q. And you have produced those documents?

A. I have.

Q. These are the documents which I am holding (indicating)? [311] A. That is correct, sir.

Q. Those documents, can we describe them generally? A. They are folders.

Q. And they are job folders relating to the jobs which Coast Insulating did as numbered on the subpoena duces tecum?

A. That is correct, sir.

Q. Are they all there, Mr. Krause?

A. All of them that we have done.

Q. All of them that Coast did?

A. That is correct, sir.

Q. Are there any other documents in this folder?

(Testimony of Gustav J. Krause.)

A. No, sir.

Q. Are there any other manufacturers' price lists? A. No, sir.

Q. What tile does your company handle, Mr. Krause?

A. Simpson acoustical tile and Flintkote.

Q. And those companies have, I take it, from time to time, given you price lists of their products, haven't they? A. That is correct, sir.

Q. But you do not have any of them in your files at the present time?

A. Each price list is superseded and we don't keep the old price lists.

Q. Has the price list been superseded since January 1, [312] 1953? A. That is correct, sir.

Q. So that the price lists which were requested are no longer in your file?

A. That is correct, sir.

Q. Now, what about the price lists requested relating to the installation of acoustical tile, do you have any of those in your file?

A. We don't have installation price lists.

Q. You have none whatever? A. No, sir.

Q. Have you ever had? A. No, sir.

Q. You have never used the price lists relating to the cost for installing tile?

A. Our jobs are estimated on the job-to-job basis.

Q. That is true, but have you ever had a price list indicating what you should charge per unit of tile, or anything of that sort?

(Testimony of Gustav J. Krause.)

A. Well, we have a standard price list which is put out by the manufacturers.

Q. That is the price they charge you, your company? A. That is right, sir.

Q. Have you had a price list indicating a price that should be charged per unit or otherwise for installing tile by your company?

A. Do you mean a unit price list? [313]

Q. Well, I mean any price list that you followed or that you utilized in making a bid to install acoustical tile.

A. We use a straight manufacturer's price list and break our jobs from that point on.

Q. In other words, you say we use the manufacturer's price list at perhaps 10 cents a square foot and whatever it may be, and we add to that in bidding a job, is that your statement?

A. That is true.

Q. Now, did you ever have that addition computed and put on a piece of paper for more convenient use?

A. Oh, yes, we have that kind. We carry a regular standard list of that type.

Q. But that is not included in these documents?

A. No, sir.

Q. Do you have that type of a list for the period January 1, 1950, such a list that you used between January 1, 1950, and January 1, 1953?

A. No, sir, we didn't use a price list at that time.

Q. So that you never did have this computation on paper of a mark-up for convenience or other-

(Testimony of Gustav J. Krause.)

wise? A. No, sir.

Q. To bid a job during that period?

A. No, sir.

Q. And those folders of documents you have produced, [314] do they contain any correspondence relating to estimating or bidding between your company and other members of the Acoustical Contractors' Association? A. No, sir.

Q. Do you have any such documents in your files? A. No, sir.

Q. Have you had any such documents in your file? A. No, sir.

Mr. Ackerson: I will ask that these documents be marked Plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' Exhibit 32 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 32 for identification.)

Mr. Ackerson: That is all, Mr. Krause.

(Witness excused.)

Mr. Ackerson: May we have the representative of the Harold E. Shugart Company step forward?

EVELYN ESTHER SHEEHY

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

A. Evelyn Esther Sheehy.

The Clerk: Will you spell your last name?

The Witness: S-h-e-e-h-y. [315]

Direct Examination

By Mr. Ackerson:

Q. Is it Mrs. Sheehy?

A. No, it is Miss Sheehy.

Q. Miss Sheehy, what is your position with the Shugart Company?

A. Secretary-treasurer, office manager.

Q. Did you have anything to do with compiling these documents you are submitting today?

A. I just helped a girl pull them from the files this morning.

Q. Under whose direction did you do that?

A. My direction. I got the job numbers for her and we looked in the files and pulled them out.

Q. And these are all the documents you were able to find in response to the subpoena duces tecum? A. Yes, sir.

Q. In the files of the Shugart Company?

A. Yes, sir.

Q. These documents consist generally of job documents, various documents on various jobs performed by the Shugart Company?

(Testimony of Evelyn Esther Sheehy.)

A. Yes, sir.

Q. Miss Sheehy, are there any documents in these that you have submitted today relating to manufacturer's list [316] prices?

A. I don't really know exactly what you mean. There might be some prices used in bidding these, that would be manufacturer's prices.

Q. What particular tile does your company handle, do you know?

A. We have the franchise products of the Celotex Corporation.

Q. Any other company?

A. No, not any franchise products.

Q. Do you handle any other acoustical tile other than Celotex? A. No, that is what I mean.

Q. Do you have any price lists from Celotex Company, lists of prices that you buy tile by?

A. (Pause.)

Q. You have seen such price lists around the company, haven't you? A. Yes.

Q. Are any of such price lists in these documents that you have submitted this morning?

A. I wouldn't think so, no.

Q. If I asked you, would you submit such prices or would you send those prices into court?

A. Well, I don't know whether we would have any except [317] maybe a very current price list. It couldn't have been the price list for this time.

Q. Do you know what the price lists are? Do you know whether it has varied, say your current

(Testimony of Evelyn Esther Sheehy.)

list as to 12 x 12 one-half inch tile? Are you acquainted with that part of the business?

A. I don't have too much to do with the pricing. I do the office management.

Q. Then I take it your answer is, Miss Sheehy, that the price lists called for between January 1, 1950, and January 1, 1953, have been superseded in some way? A. Yes.

Q. By more recent price lists?

A. That is true.

Q. And you do not have the ones that I called for, is that right?

A. I don't have them here. I don't know as we would have any around the place that old. There was a few price lists that just went into effect.

Q. If you don't know these answers, tell me. I am trying to decide whether to ask you to bring me some more documents or not.

A. I wasn't subpoenaed, you know.

Q. I realize that. Your company was, but you appeared for your company. [318] A. Yes.

Q. Do you know enough about the business to know that when there is a superseding price list that there may be a change of price that may be on a specialty tile or something, that that would require a new price list? A. I do.

Q. That is true, isn't it? A. Yes.

Q. Just one change on one specialty item and you get a new price list, is that right?

A. Well, no, they don't always put out a new

(Testimony of Evelyn Esther Sheehy.)

price list, if they change the price of one item. Is that what you mean?

Q. Yes. A. No, I don't think so.

Q. Do you know whether there has been a change on price of 12 x 12 one-half inch acoustical tile since 1953?

A. I couldn't say—from 1951 to '53, you mean now?

Q. Yes. A. I wouldn't know back that far.

Mr. Ackerson: Thank you, Miss Sheehy.

I will ask that this be marked Plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' Exhibit 33 for identification. [319]

(The document referred to was marked Plaintiffs' Exhibit No. 33 for identification.)

Mr. Ackerson: That is all, Miss Sheehy. Thank you.

(Witness excused.)

Mr. Ackerson: Is there a representative of the L. D. Reeder Company here?

WILLIAM S. REEDER

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: William S. Reeder.

The Clerk: Will you spell your last name?

The Witness: R-e-e-d-e-r.

(Testimony of William S. Reeder.)

Direct Examination

By Mr. Ackerson:

Q. Mr. Reeder, what is your position with the L. D. Reeder Company?

A. I am the manager of the Los Angeles office.

Q. And you are appearing here today in response to a subpoena duces tecum? A. Yes.

Q. Do you have the documents called for in that subpoena?

A. I have located one job, No. 39 on your [320] list.

Q. Can you state that that is the only job you performed of the jobs listed on that list?

A. To my knowledge that is the only one. I looked through the file and that is the only one I could find.

Q. Did you make a thorough search?

A. Yes.

Q. Is it possible there could have been other jobs?

A. I would say not. I made a very complete search.

Q. You ordinarily keep the records of these jobs the L. D. Reeder Company actually performs for a matter of four or five years, don't you?

A. That is right.

Q. So that if any job that you performed was missing, it would be a matter of missing it?

A. That is correct.

Q. And it could be located later? A. Yes.

(Testimony of William S. Reeder.)

Q. There were three other items, Mr. Reeder. Does this file contain any manufacturer's price lists in the possession of the Reeder Company between January 1, 1950, and January 1, 1953?

A. No, it does not.

Q. Do you have any such price lists in your file?

A. No, we destroy all old price lists to avoid confusion. [321]

Q. When did you get price lists after January 1, 1953?

A. I believe the last price list—well, the last one came out February of this year, I believe. [322]

Q. What tile does your company use?

A. Armstrong Cork.

Q. Armstrong Acoustical, isn't it?

A. Yes.

Q. Does this folder you have submitted contain any pricing material? I mean any price lists relating to the installation of acoustical tile by L. D. Reeder Co.?

A. It contains my estimate in there of what I think the labor should be, and the material, and so forth.

Q. But that relates only to this one contract?

A. Well, all our jobs are broken down that way.

Q. I know, but the price lists you are talking about is your work in connection with this one contract? A. This particular job, that is right.

Q. I am asking you about a price list or a price compilation for guidance on any job you list.

A. Well, we did use one. We haven't used one

(Testimony of William S. Reeder.)

here recently, because we made mistakes on some jobs. That is a good way to check and see if we are figuring the jobs right.

Q. Did you use such a list during the period, between the period January 1, 1950, and January 1, 1953? A. No, sir.

Q. Are you—— A. This is just a new one.

Q. Your statement is you never did use a unit price [323] list for figuring the installation of acoustical tile on a job.

A. Not during those dates. We do now; we have a check.

Q. But never prior to January 1, 1953?

A. No, sir.

Mr. Ackerson: May I ask this folder be marked as Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiffs' 34 for identification.

(The folder referred to was marked Plaintiffs' Exhibit 34 for identification.)

Q. (By Mr. Ackerson): Would you mind staying there just a moment, Mr. Reeder?

Mr. Reeder, if I should call your attention to an additional job which L. D. Reeder Co. performed during this period, and which you were unable to find in your search, in response to the subpoena, would you be willing to bring them in?

A. If I can find them. I will be happy to look for them.

Mr. Ackerson: That is all. Thank you.

(Witness excused.)

Mr. Ackerson: I will call the representative of Acoustics, Incorporated. [324]

HOWARD CARLTON SMITH

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Pelase be seated. Your full name, sir?

The Witness: Howard Carlton Smith.

Direct Examination

By Mr. Ackerson:

Q. Mr. Smith, you are with Acoustics, Incorporated, is that your company?

A. That is right, sir.

Q. What is your position with that company?

A. Vice president, sir.

Q. You are appearing today in response to a subpoena duces tecum issued by the plaintiffs?

A. That is correct, sir.

Q. And do you have the documents called for?

A. Yes.

Q. Would those documents consist of the jobs on the list in the subpoena which Acoustics, Incorporated, performed? A. Yes, sir.

Q. Do the documents likewise include any manufacturers' price lists during the period January 1, 1950, to January 1, 1953? A. No, sir.

Q. Can you explain why they are not present in these [325] documents?

A. As a new price list comes out we destroy the

(Testimony of Howard Carlton Smith.)

old, to avoid confusion, and we don't have any list of prices prior to, I believe, January of this present year.

Q. What tile does Acoustics, Incorporated, handle, that is, acoustical tile?

A. We handle Pioneer-Flintkote acoustical tile.

Q. How long have you handled that?

A. Well, I am a little vague on this. I believe we took the line on in about 1952, or the first part of '52.

Q. And would it be about February, 1952, Mr. Smith? A. I would say so, possibly.

Q. Do you handle any other tile, any other brand of acoustical tile, other than Flintkote?

A. We have bought Fir-Tex acoustical tile.

Q. Did you handle Fir-Tex prior to February of '52? A. Yes, sir.

Q. So that Flintkote was a new line for you?

A. Yes, sir.

Q. Now, did Flintkote issue you price lists in '52, when you took on their line? A. Yes, sir.

Q. You had a price list, of course, from Fir-Tex at that time. Was that the other line you had?

A. Yes. [326]

Q. But both of those price lists have been superseded? A. Since then.

Q. Since '53? A. Since that time.

Q. Do these documents which you have produced, Mr. Smith, contain any pricing material or pricing information which Acoustics, Inc., or your company used in connection with submitting bids or figuring bids during 1950 to '53?

(Testimony of Howard Carlton Smith.)

A. I am sure there must be some evidence—we secured the contract.

Q. I mean aside from your figuring on the contract, is there any unit price list your company used or that you have submitted today?

A. Not to my knowledge, no, sir.

Q. In other words, you were not able to find any such list as that, or any such compilation or any such written information that you used in assisting you or your salesmen in computing an acoustical tile bid during that period?

A. You are talking about a unit?

Q. A unit price list, yes. Installed price 30 cents per square foot, ½ inch, 12 x 12, acoustical tile. I don't mean the figures, but some such things as that.

A. No, not to my knowledge.

Q. Not to your knowledge, that there are any such documents? [327]

A. Any such documents here.

Mr. Ackerson: I see. I will ask these folders be marked Plaintiffs' Exhibit for identification next in order.

The Clerk: Plaintiffs' 35 for identification.

(The folders referred to were marked Plaintiffs' Exhibit 35 for identification.)

Mr. Ackerson: Thank you, Mr. Smith.

Mr. Black: One moment, Mr. Smith.

No. 15005

United States
Court of Appeals
For the Ninth Circuit

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

Transcript of Record
In Three Volumes

Volume II
(Pages 433 to 852)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-13-56

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-13-56

(Testimony of Howard Carlton Smith.)

Cross-Examination

By Mr. Black:

Q. Do you recollect how long before you got your first shipment of tile from The Flintkote Company that you had taken on the line, so to speak?

A. It would be difficult for me to give you that answer. I am certain I could get it from our records. I could not give you that answer myself.

Q. If our records indicate that the first shipment of tile made by the Flintkote people to your company was June 3, 1952, would that help you in any way to establish the date when you formed that connection with Flintkote?

Mr. Ackerson: If your Honor please, I think there should be a foundation as to whether this man had anything to do with the purchase. There is no proper foundation laid for this question.

Mr. Black: He purported to testify from memory and he [328] was in the company at the time. I am just trying to discover the dates of the——

The Court: Counsel is making statements to see if it refreshes the witness' recollection.

Mr. Ackerson: I will withdraw the objection, if the witness knows.

Mr. Black: We can establish it.

The Court: If you can't answer the question, just say so.

The Witness: It doesn't. I couldn't give any positive answer, one way or the other.

(Testimony of Howard Carlton Smith.)

Q. (By Mr. Black): And as a point of fact, you are not sure about that February date, are you?

A. No, sir.

Q. It could have been a couple of months later?

A. It could have been months later or months earlier.

Mr. Black: That is all. Thank you.

(Witness excused.)

Mr. Ackerson: If your Honor please, these documents have been produced and I have agreed to stipulate that the originals may be withdrawn upon the substitution of photostats, the usual stipulation, by either party. Is that satisfactory with the court?

The Court: Satisfactory with the court if it is with the parties.

Mr. Black: Yes, it is with us. Of course, reserving [329] all objections to the admission of them.

Mr. Ackerson: It is just a stipulation. Some of these contracts they may need and there would be no impediment to their access to it.

Mr. Black: There will be no argument it is not the best evidence.

The Court: As I understand it, if anyone needs the original—that would have to come through you, Mr. Ackerson, as you brought them in here—you appear and arrange with the clerk to photostat it and we will accept the photostat in lieu of the original.

Mr. Ackerson: Yes.

Mr. Black: That is perfectly satisfactory.

Mr. Ackerson: Now, your Honor please, that concludes the duces tecum witnesses. I will call Mr. Lysfjord.

ELMER LYSFJORD

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. Your full name, please?

The Witness: Elmer Lysfjord.

Direct Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, will you keep your voice up?

A. Yes, sir.

Q. You may think you are talking loudly on the stand [330] there, but it is difficult to tell until we can hear you.

You are one of the plaintiffs in this instant proceeding, are you not? A. Yes, sir.

Q. Mr. Lysfjord, what has been your experience in the acoustical tile contracting field? When did you first start in the field? What was your early experience?

A. In 1941 I worked as an applicator, a carpenter installing the tile.

Q. Who was that for?

A. Harold E. Shugart Company.

Q. Was that here in Los Angeles?

A. In Los Angeles.

(Testimony of Elmer Lysfjord.)

Q. Have you ever had any experience in the acoustical tile field in any other area than Los Angeles?

A. I worked for about a year or maybe a year and a half in Chicago in the same field.

Q. And that was prior to your experience with the Shugart Company? A. Yes, sir.

Q. How long did you work for the Shugart Company as an applicator?

A. Approximately about five years.

Q. That was from what, 1941 to '46?

A. I would say so, yes. [331]

Q. Then what did you do?

A. I was a salesman for the Coast Insulating Company. However, that might be 1947; I am not too sure. [332]

Q. As to the dates, I just want relative dates unless it becomes important to make them more definite.

Anyway, you left the Shugart Company as an applicator and you became a salesman for Coast Insulating Products? A. Yes, sir.

Q. Then how long did you continue on that job as a salesman? A. Approximately a year.

Q. And that would bring us up to around when, 1948 or thereabouts? A. Thereabouts, yes, sir.

Q. Then what did you do?

A. Became a salesman for the Downer Company, Howard W. Downer.

Q. That is the Howard——

A. R. W. Downer Company.

(Testimony of Elmer Lysfjord.)

Q. What did you do for the Downer Company? You said you were a salesman for the Downer Company? A. Yes.

Q. How long did you remain a salesman for the Downer Company?

A. As near as I can recall, it was about January, the end of January of 1951.

Mr. Black: '52, don't you mean?

The Witness: I beg your pardon. '52. [333]

Mr. Ackerson: Thank you, Mr. Black.

Q. Then I take it you went into business for yourself? A. Yes, sir.

Q. Mr. Lysfjord, while you were with the Downer Company, can you give us an estimate at the present time of your monthly earnings from that company?

A. Well, I can't recall the first years, however, the last year it was somewhere around $1,200 to $1,400 a month.

Q. And those earnings consisted entirely of commissions, did they not? A. Yes, sir.

Q. In other words, you didn't draw a salary there, did you? A. No, sir.

Q. All the pay you got was from commission work? A. That is true.

Q. If you sold no job, you got no pay?

A. That is true.

Q. Now, prior to January 1, 1952, had you made any attempts to go into business for yourself by way of getting a line of acoustical tile?

A. I had tried for several years to interest some-

(Testimony of Elmer Lysfjord.)

body in selling me acoustical tile without too much success, until such a time as I talked to Mr. Ragland.

Q. Do you recall any of these people that you contacted [334] in this respect?

A. Oh, yes. Mr. Robert Huebleine.

Q. What company was he with?

A. Armstrong Cork.

Q. Would you spell that for the reporter?

A. H-u-e-b-l-e-i-n-e, I believe.

Q. What did Mr. Heubleine tell you? By the way, when did you contact Mr. Huebleine, approximately?

A. Probably in 1950, '51, somewhere in through there.

Q. What did Mr. Huebleine do, did he sell you the line or not?

A. No, sir. He said that all our materials are sold on franchise and we don't believe that we can sell you.

Q. Did you contact anybody else, any other line of acoustical tile?

A. Mr. McClave of the same company, and I got the same answer.

Q. Did you contact any other companies?

A. The Simpson Logging Company.

Q. Is that the Simpson brand of acoustical tile?

A. Yes, sir.

Q. That is the manufacturer? A. Yes, sir.

Q. How did you contact them? Who did you contact there? [335]

(Testimony of Elmer Lysfjord.)

A. I forget the man's name. However, I recall the place. It was their office and warehouse on Washington Boulevard near Alameda.

Q. When was that approximately? What year, Mr. Lysfjord?

A. Somewhere in the same year, '50.

Q. What was the result of that, negative?

A. Yes, sir.

Q. Now tell us about when you first started contacting The Flintkote Company for a line of acoustical tile?

A. Well, I believe it was somewhere in July of 1951.

Q. Who did you contact?

A. Mr. Robert Ragland.

Q. How long have you known Mr. Ragland?

A. Probably 10 years.

Q. Where did you first meet him?

A. He used to work for me at the Shugart Company.

Q. As an applicator? A. Yes, sir.

Q. When you say he used to work for you, I take it that you probably were a foreman and he was under you, is that right? A. Yes, sir.

Q. And how long did that relationship continue?

A. Oh, probably a few years. [336]

Q. During what period was that, Mr. Lysfjord?

A. Somewhere around 1942 or '3, I would say.

Q. '42, '43, '44?

A. Maybe up as high as '45. I don't recall exactly when I first met him.

(Testimony of Elmer Lysfjord.)

Q. And did you continue to have associations with him subsequent to that time?

A. I believe we have been fairly good friends in the past.

Q. In other words, you met him back in '41, '42, or '43, and you have been fairly good friends ever since? A. Yes.

Q. Did you see him quite frequently?

A. I would say probably once a week.

Mr. Black: Did you say did you or do you?

Mr. Ackerson: Did you.

Mr. Black: Thank you.

Q. (By Mr. Ackerson): How long did Mr. Ragland remain with the Shugart Company, up until the time you left?

A. It is a little hard for me to say exactly when he left. However, he became a salesman for the company and I didn't see him quite as frequently as I had done before.

Q. Was that after you left the Shugart Company or before? [337]

A. He was still a salesman at the Shugart Company at the time I left the Shugart Company.

Q. I see.

Then let us get back to these conversations or this conversation which you had with Mr. Ragland some time in July, 1951. Where did that conversation take place, if you recall? [338]

A. The first time it was probably over a cup of coffee at the nearest contractor's office that we had met at.

(Testimony of Elmer Lysfjord.)

Q. You mean near his contractor's office?

A. No, a contractor's office. In other words, he was selling acoustical tile and so was I at that time.

Q. So it was a casual meeting at that time?

A. Yes. I beg your pardon.

Q. We are talking about July, 1951.

A. Yes. No, I was going back to the time when he was a salesman and so was I in our meetings.

Now you are referring to when I was inquiring about getting an acoustical tile, is that right?

Q. From The Flintkote Company.

A. Then it was in July of 1951.

Q. Do you know how long Mr. Ragland has been with The Flintkote Company at that time?

A. No, sir, I do not.

Q. But he was with The Flintkote Company in July of 1951? A. Yes, sir.

Q. And he was in the acoustical tile part of the Company? A. Yes, sir.

Q. Where did this meeting in July, 1951, take place, Mr. Lysfjord? [339]

A. Well, probably in some cafe having a cup of coffee.

Q. Do you recall what was said?

A. Well, it was my usual question—what do you think you can do about getting some acoustical tile for me? I had been asking everybody I could meet for many years as to how I could get it.

Q. Did he give you any encouragement, if he did, or just say what he told you?

(Testimony of Elmer Lysfjord.)

A. He said, "I will do everything in my power to get acoustical tile for you because I think you would do a good job for us but I can't tell you anything at this time one way or the other."

Q. Did you have a subsequent meeting or meetings with Mr. Ragland on the same subject matter?

A. Well, I probably met him half a dozen times before anything was actually brought to a point where I became elated in the fact that there was a possibility.

Q. You mean you probably met him a half a dozen times after July, 1951? A. Yes, sir.

Q. And when was the first meeting that you recall that you would call a serious meeting? You have mentioned when you became elated or hopeful. When did that occur?

A. Well, at one of these meetings he mentioned that he also covered—I mean by "he," Bob Ragland—covered the [340] northern part of the area here, or Northern California, and he thought that I could get a line there very easily if I were interested.

And I told him that I don't think that I would be interested in moving out of California because I had all my background and contacts right here in Los Angeles, and it would be rather difficult to go that far from home.

He said, "Well, I will just have to go and try again and see if I can get you in here in the Los Angeles area."

(Testimony of Elmer Lysfjord.)

Q. Can you state whether or not that was before or after August, 1951?

A. Much before August.

Q. Did you have a subsequent meeting with Mr. Ragland concerning the same subject?

A. Well, yes, he called me one day and said that he had been able to interest his company in the fact that I would like to have acoustical tile, and if I would be interested he would like to introduce me to a Mr. Baymiller.

Q. Can you tell us about when that was, Mr. Lysfjord, the month?

A. We are probably getting up into August now.

Q. Did you have such a meeting? A. Yes.

Q. And can you state approximately when and where?

A. In the month of August at the Manhattan Club. [341]

Q. Do you think it was the month of August? And where is the Manhattan Club? Is that the same club that your associate mentioned in his testimony? Did you hear that part of your associate's testimony? A. Yes, sir.

Q. The same club? A. The same club.

Q. Where is the Manhattan Club with respect to the Flintkote Company's offices? How far away?

A. Oh, probably five miles, I would judge.

Q. Where is it with respect to the first location of the aabeta company in Los Angeles?

A. Not much further.

Q. About the same distance?

(Testimony of Elmer Lysfjord.)

A. Same distance.

Q. Tell us about this meeting at the Manhattan Club and tell us, if you can, the substance of the conversation, who was there, what was said, what was done?

A. Well, I met Mr. Baymiller in the company of Mr. Ragland and——

Q. Who arrived there first? Were they there when you got there or did you precede them, or how did you get there?

A. I drove my car there. I don't recall.

Q. Did you go alone?

A. I went alone; yes, sir. [342]

Q. Do you recall whether Mr. Ragland, Mr. Baymiller, whether they were there when you arrived, or did you get there first?

A. It is a little difficult to say.

Q. Anyway, you all three arrived sooner or later? A. Yes, sir.

Q. Now proceed. I am sorry I interrupted. What was said and what was done?

A. Well, Mr. Ragland introduced me to Mr. Baymiller and said, "This is the fellow that I had in mind for handling our acoustical tile."

Mr. Baymiller shook my hand and we probably only talked about things to get acquainted with at that time, not discussing any tile, whether I was to get it or not. I think it was just to make an acquaintance of me at that time, to see what Mr. Baymiller thought of me at that time.

Q. Thought of your appearance, personality, or

(Testimony of Elmer Lysfjord.)

what? A. Possibly appearance.

Q. Did Mr. Baymiller at that time inquire into your experience, if you recall?

A. Well, rather superficially, just that Ragland said I had done a very good job in selling in the area and he was aware of it because at one time he was a competitor of mine and that he—I keep saying "he"; I should use names—Bob Ragland said again he was trying every effort on his part [343] to get a line for us in the Los Angeles area, and again Mr. Baymiller mentioned, "Well, I really can't say for myself because we have to clear through the home office." [344]

Q. Well, is that about the generalities that were discussed at this first meeting with Mr. Baymiller?

A. I would say so.

Q. How did the meeting break up? Was there arrangements for a subsequent meeting or was it left at that?

A. Well, Mr. Baymiller said he was very pleased to meet me and he thought perhaps he could do me some good, but he couldn't give me any definite answer until he had checked further with his company.

Q. Was Mr. Waldron's name brought up at that meeting, do you remember?

A. Not that I recall.

Q. It was strictly a meeting between the three of you, interrogation of yourself or inquiry of you?

A. Yes.

(Testimony of Elmer Lysfjord.)

Q. When was the next time you had a meeting with Flintkote representatives?

A. A matter of a week or two later at the same place.

Q. Who attended that meeting?

A. Mr. Waldron, Mr. Baymiller, Mr. Ragland, Mr. Thompson and myself.

Q. What time of day was that? A. Lunch.

Q. You said it was at the same place?

A. Yes. [345]

Q. Manhattan Supper Club? A. Yes, sir.

Q. Is that sort of in between your two offices or is it beyond your office or beyond their office?

A. I really don't know, sir, only that they suggested it and I had no reason to not want to go there.

Q. Tell us what occurred at that meeting. I thought maybe it was a special haunt of one of these people, either you or Mr. Waldron or Mr. Baymiller or Mr. Thompson or Mr. Ragland.

Tell us what happened at this second meeting, Mr. Lysfjord. You have five of you present. It is lunch hour. If you can reconstruct, the best you can to your recollection, tell us what happened, what was said.

A. Well, at this meeting—of course, we had had a phone call before going to this meeting.

Mr. Black: I am sorry.

Q. (By Mr. Ackerson): Who called you?

Mr. Black: I didn't hear that, please, Mr. Lysfjord. Will you repeat that?

(Testimony of Elmer Lysfjord.)

The Witness: I said I had had a phone call to arrange this meeting.

Q. (By Mr. Ackerson): Who arranged it?

A. Mr. Bob Ragland.

Q. Where did you receive the call, at your [346] Downer Company? A. Yes.

Q. You were with the Downer Company at that time, were you not? A. Yes, sir.

Q. Mr. Ragland called you and you met at the Manhattan Club about noon about two weeks after the first meeting.

The people are present. Who opened the meeting and what was said?

A. Well, at this time Mr. Thompson seemed to be—should I say the monitor—in any case, he did the talking. And we just listened. He asked quite a few questions.

Q. What did he ask? What did he say?

A. Well, probably again the same as Mr. Baymiller, the background I had had in the field and the ability that I had in selling.

Incidentally, he said, "It is very nice for you to tell me you are pretty good. Let me see what you have done."

And that is why I mentioned the phone call, because at the time Mr. Ragland mentioned if I had anything that could prove the fact I had been selling pretty well in the area it would be well if I brought it along.

Q. Did you bring it along?

A. I brought a series of contracts that I had

(Testimony of Elmer Lysfjord.)

in my possession at that time for close to $40,000.00 worth of work. [347]

Q. That was $40,000.00 worth of work you had sold for the Downer Company?

A. Well, I don't quite like to say for the Downer Company. I sold it for myself and we, in turn, would work together on the job.

Q. But the Downer Company, they were contracts which the Downer Company was to perform as a result of your work? A. Yes, sir.

Q. Did you show those contracts to Mr. Thompson? A. I did.

Q. Mr. Baymiller? A. I did.

Q. Who were those contracts with, if you recall?

A. The majority of them were with the firm called the Jackson Brothers. There were two or three with the Hagen-Lee Company.

Q. When you showed those to Mr. Thompson, did he say anything?

A. I think he was slightly surprised at that magnitude of contracts at one time, and he asked me if I thought that I could continue doing work with these people on the same scale.

I said I had every assurance of doing so, because I had been doing a good bit of work with these people in the past and I had no reason to doubt I could do it again. [348]

Q. Did Mr. Baymiller, during this meeting, say anything of significance, or Mr. Ragland?

A. I don't think Mr. Ragland even said a word. However, Mr. Baymiller mentioned that he thought

(Testimony of Elmer Lysfjord.)

perhaps that I would probably make a good man for his company.

Q. Well, how long did the meeting last, approximately? A. Oh, probably an hour.

Q. During the lunch hour? A. Yes, sir.

Q. Was there anything else said? Did you supply any other information or were you requested to or did they say anything or did you say anything?

A. Well, yes. They went ahead further. Mr. Thompson mentioned that they thought perhaps, or, rather, he thought their company would allow us to work here in this area, but they hadn't had adequate coverage in the outlying area of San Bernardino and Riverside.

And he said, "In view of the amount of work you have been doing here in Los Angeles, don't you think you could find time to augment some of your efforts in the San Bernardino area?"

Q. What did you say?

A. I said, "I think perhaps that could be arranged."

Q. Mr. Waldron, did he have anything to say at this meeting? [349]

A. Very significant thing. He mentioned that we were well aware that any time that he and I were to start an acoustical contractors business there would be terrific pressures brought to bear by these other contractors, to not allow us to go into this business.

And Mr. Thompson said that, as a matter of fact, he gave a little laugh and said, "Pioneer-Flintkote

(Testimony of Elmer Lysfjord.)

is a pretty big firm and I don't believe that anybody can intimidate us, and when we say something, it is to be, and that is the way it will be."

And we could be assured—we could rest assured at no time would any outside people have any influence on them.

Q. Now, Mr. Lysfjord, I take it that was Mr. Thompson's reply in response to something Mr. Waldron said? A. Yes.

Q. In other words, have you stated what Mr. Waldron said?

Mr. Black: Objected to as already asked and answered.

Mr. Ackerson: Very well, I will leave the answer as made.

Q. (By Mr. Ackerson): Now, have you pretty well covered the meeting, as you recall, or was there something else said?

A. Well, Mr. Thompson said that he felt quite sure that we would be acceptable to his company as a distributor [350] for him, or for them in the Los Angeles area, if we promised to cover, along with the Los Angeles area, the San Bernardino and Orange County area. But that the final say-so would depend on whether we had a financial statement large enough for acceptance to their credit manager.

He instructed us to prepare one and bring it to The Flintkote Company, and that they would call us in a short time and tell us exactly what the verdict was or what their opinion was.

But we were led to believe—we weren't even only

(Testimony of Elmer Lysfjord.)

led to believe, but he told us we had a hundred per cent chance of being their distributor.

Q. That financial statement, I take it, is the same financial statement that has been introduced in evidence here, as I believe it is Plaintiffs' Exhibit 1.

Is this the financial statement that you had prepared as a result of that conversation?

A. Yes, sir.

Q. That statement was subsequently submitted to the Flintkote Company officials, is that correct?

A. Yes, that is correct.

Q. Now, have we about covered that meeting?

A. I can't recall anything else at this time.

Q. When did you next hear from either Ragland, Baymiller or Thompson? [351]

A. Shortly after that I got a call to appear at the office of The Flintkote Company, in the presence of Mr. Waldron, or bring Mr. Waldron with me. I don't recall if he got a call, too, but I was told that the two of us were to be there.

Q. About how long after this last Manhattan Club meeting was that?

A. A matter of a week or two.

Q. Can you give us approximately the month or the time of the month of this meeting we are leading to now?

A. I would say somewhere in November; perhaps the latter part of November.

Q. Did you and Mr. Waldron attend this meeting? A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. Where was it held?

A. The Flintkote offices.

Q. That is down on Alameda, is it?

A. Yes, sir.

Q. Who was there besides you and Mr. Waldron?

A. Mr. Thompson, Mr. Baymiller and Mr. Ragland.

Q. Now, will you just tell us, try and reconstruct the meeting, who arrived, and when you arrived what you found there, and who was there when you arrived, and which office you went to, and what was said and who said it?

The Court: Let's get all the foundation and then we [352] will take a recess, before he gets to the conversation.

Mr. Ackerson: Very well.

Q. (By Mr. Ackerson): The meeting took place around the latter part of November, to the best of your recollection? A. Yes, sir.

Q. Who attended the meeting?

A. Mr. Ragland, Mr. Baymiller, Mr. Thompson, Mr. Waldron and myself.

Q. And did you also see Mr. McAdow at that meeting?

A. A little later on in the day, yes, sir.

Q. Did you see Mr. Harkins at that meeting?

A. Yes, sir.

Q. It was at TheFlintkote Company office?

A. Yes, sir.

The Court: Did you see anyone else there?

The Witness: A good number of the office per-

(Testimony of Elmer Lysfjord.)

sonnel, but no names that would be pertinent to this conversation.

The Court: We will recess until 20 minutes before 4:00.

(Short recess taken.) [353]

The Court: Do you want the answer to the last part of the question or do you want to put it over?

Mr. Ackerson: The last?

The Court: Do you want the answer to the last part of the question or do you wish to ask it again?

Mr. Ackerson: I will put it over, your Honor.

Q. Did you state that Mr. Ragland arranged this meeting, as far as you were concerned?

A. Which meeting?

Q. This meeting at the Flintkote Company's offices where we left off? A. Yes, sir.

Q. Mr. Ragland called you? A. Yes, sir.

Q. When you and Mr. Waldron arrived at the Flintkote offices, whom did you find there?

A. I believe it was Mr. Baymiller and Mr. Ragland and a few minutes later Mr. Thompson arrived.

Q. Did they have separate offices there, and if so whose office did you go to?

A. I was under the impression it was Mr. Thompson's office.

Q. And those three people followed you and Mr. Ragland or at least all five of you went in there?

(Testimony of Elmer Lysfjord.)

A. We met him there at that office and shook hands and he mentioned that he thought we were adequately financed to do the job that they expected of us.

Q. Let me ask you, did you have your financial statement, Plaintiffs' Exhibit 1, with you at that time?

A. I believe that was the time that it was presented to him; yes, sir.

Q. In other words, it was presented to Mr. McAdow either at that time or at a different time?

A. Yes, sir.

Q. And it is your recollection that it was at that time? A. I believe so. [357]

Q. What did Mr. McAdow say, if anything, and what occurred thereafter?

A. Only what I just stated, he thought we were adequately financed.

Q. Then did anything else happen at the Flintkote offices that day?

A. Mr. Baymiller then took us from Mr. McAdow's office to a Mr. Harkins' office.

Q. Do you recall who Mr. Harkins was?

A. As I understood it, he was the manager of all the Flintkote products in the western area.

Q. Did you understand he was Mr. Thompson's and Mr. Baymiller's and Mr. Ragland's superior?

A. Yes, sir.

Q. What occurred when you arrived at Mr. Harkins' office? By the way, where is his office, do

(Testimony of Elmer Lysfjord.)

you recall, with respect to Mr. Thompson's office or Mr. McAdow's office?

A. Well, it was around the perimeter of the general large office. I mean each had an office somewhat separate from the other, but all on the perimeter of this larger office.

Q. All right. Go ahead and tell us what occurred in Mr. Harkins' office.

A. Mr. Baymiller introduced Mr. Waldron and myself to Mr. Harkins and then he left. [358]

We were invited to sit down and talk with Mr. Harkins, and he, to me, seemed quite expansive in his conversation, as to, "It is a wonderful thing to be a young man and go out in the world and fight and make a mark for yourself," and that sort of thing.

He went along a little further and mentioned he had started from the bottom and worked up into the position he was in. And he thought that there couldn't be any reason why we couldn't do the same and that the Flintkote Company would do everything within their power to help us along the line.

And that although he wasn't too familiar with the acoustical tile field itself, that they were making every effort to make a finer tile, a better tile and they were at that time, I believe, working on a fissured tile, one type of material they did not have. And they felt, that in the very near future, they would have that and also supply that to other dealers, including us.

He also mentioned a contract that he either

(Testimony of Elmer Lysfjord.)

obtained or he had influence in getting on roofing for a quite large area, the Ryan Aircraft, east of town here.

Q. Are you sure of the name of the company, Mr. Lysfjord? I mean the Ryan Aircraft name, are you pretty certain of that? A. Well——

Q. Or could it have been another job? [359]

A. Well, it is possible. However, I know where the job is and I could go look at the name on it, if that were real important.

Q. Where is the job?

A. East of L. A., between here and Pomona.

Q. At any rate, what did Mr. Harkins say about that, other than that the Flintkote Company had supplied the roofing or was going to supply the roofing?

A. He said there was a great deal of acoustical tile in that job, in that, and he thought it might be a very opportune time for our company to see what we could do to prove ourselves, and that he was well acquainted with the contractor; the contractor's name, which I am very certain of, was Buttress & McClelland. They are on East—rather, West Beverly Boulevard here in Los Angeles. And if we felt in any way he could help us in obtaining that contract that he would be very happy to do so.

There was a general shaking of hands and good will, and "Go out there and fight," sort of thing and "Do a good job," and then we left.

Q. Now, you mentioned stationery. Did you at that time or subsequently, or both of you confer

(Testimony of Elmer Lysfjord.)

with any member of Flintkote as to the stationery requirements?

A. I talked at quite a length with Mr. Ragland, asking his opinion of what he, rather his experience on how to improve [360] the drawing that I had, if he had any suggestions, and he said he had one, and that was to use a Flintkote cut. A cut is a little printing device to put their, the Flintkote name on our stationery.

Q. Did Mr. Ragland offer to have Flintkote supply you with such a cut?

A. Mr. Ragland took me down to their advertising office and presented me with a cut.

Q. Where was that office with respect to Mr. Ragland's office?

A. Oh, somewhat down the street, in the same general area. I believe within a quarter of a block from the main office.

Q. Did you obtain a cut at that occasion?

A. I did. However, it was too large. We couldn't use it. It was a little too obvious in the size that we had allotted it on our printing.

Q. What did you do with that cut? Did you return it?

A. No. As a matter of fact, the printer still retains that cut.

Q. Did you subsequently or aabeta co. subsequently receive a smaller cut from the Flintkote Company?

A. Yes, sir, another cut was mailed by their advertising department to our Los Angeles address.

(Testimony of Elmer Lysfjord.)

Q. The Bell and Atlantic address? [361]

A. Yes, sir.

Q. Do you recall the type of envelope it came in or anything of the sort? Do you have any distinct recollection of receiving it?

A. Very much so. It was a very small, heavy manila envelope.

Q. Do you know where that cut is?

A. That, too, is at the printer's.

Q. Was that smaller cut the cut which you actually used on your stationery? A. Yes, sir.

Q. Were you here the other day at the time the Owens Roofing exhibit was introduced for identification? A. Yes, sir.

Q. Do you have in mind the green stationery which was on that exhibit? A. Yes, sir.

Q. The aabeta stationery? A. I do, sir.

Q. Is that the original, piece of the original stationery that you ordered? A. Yes, sir.

Q. Does that stationery contain this cut?

A. I believe it does.

Q. I mean an imprint of that cut. [362]

A. The small cut you are talking about? Yes, sir.

Q. Did you subsequently receive a bill from the printer for that work? A. Yes, sir. [363]

Mr. Ackerson: I am going to ask the clerk to mark this document as plaintiffs' exhibit for identification next in order.

The Clerk: Plaintiffs' Exhibit 36 for identification.

(Testimony of Elmer Lysfjord.)

(The document referred to was marked Plaintiffs' Exhibit No. 36 for identification.)

Mr. Black: May I see that, counsel?

Mr. Ackerson: Yes.

(Exhibiting document to counsel.)

Q. (By Mr. Ackerson): Mr. Lysfjord, I show you Plaintiffs' Exhibit 36 for identification and ask you if that is the bill you received from the printer for this original order of stationery for the aabeta company? A. Yes, sir.

Mr. Ackerson: I will offer that in evidence.

The Court: Received.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 36.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, you notice that this printer's bill is for 1,500 business cards, two colors. Do you remember on your business cards if they contained two colors? Do you recoginze the billing as an apt description of the cards you received? [364] A. Yes, sir.

Q. And this statement is the same with respect to the other items on the bill?

A. I don't know if they occurred in two colors or not.

Q. 500 estimates, 500 job sheets, 500 estimate sheets, and so forth.

A. Some of these are work sheets that do not have any color on them.

(Testimony of Elmer Lysfjord.)

Q. But the cards you recall did have color?

A. Yes, sir.

Q. Now, let us get back to this meeting that you have just described in the Flintkote offices as having taken place the latter part of November, 1951. What did you do next with respect to starting in business as an acoustical tile dealer, do you recall? You talked about the stationery. What did you do next?

A. I believe the next thing I did was to obtain a phone.

Q. And where was that phone installed, or at what location did you order the phone for?

A. At the warehouse that Mr. Waldron obtained on Atlantic Avenue in Bell.

Q. Did you, yourself, apply for the installation of that phone? A. I did.

Q. Do you have any idea as to the date—I think we [365] have stipulated; we haven't stipulated as to the application date; we have stipulated January 4 or thereabouts as to the installation.

Mr. Black: As to the date of installation, that is correct.

Q. (By Mr. Ackerson): With that in mind, Mr. Lysfjord, do you have any independent recollection as to how much prior to on or about January 4th you made the application?

A. It would be in the latter part of December. The thing that recalls it to my mind is the time that Mr. Ragland contacted Waldron and myself and mentioned that we had better hurry up and buy

(Testimony of Elmer Lysfjord.)

some tile because the Hilo plant was going to go on strike and we would be without tile for our first endeavors in our business if we didn't do so.

So that became the point where we started to scurry, let's say, real quick like to establish our business.

Q. In other words, you take that point, whatever that was, the date that you ordered your original load of tile as the date when you really started getting telephone connections, and so forth?

A. We started to make every effort to make the aabeta company actually a company that could function.

Q. You were still with the Downer Company or finishing up with the Downer Company at that time, weren't you? [366]

A. I was associated with them, yes, sir.

Q. And you have mentioned this original purchase order. Can you tell us how that came about? What were the mechanics in that respect? How did you come to order? You stated Mr. Ragland told you something. How did he tell you?

A. We were notified, I guess I can only talk for myself, I was notified by Mr. Ragland.

Q. How were you notified? A. By phone.

Q. Where?

A. At the Downer office. I may not have taken it personally. However, a note was left for me or I did receive the call. In any case, I got the information that I was to be at the Atlantic office in, I believe it was, the middle of December—I don't

(Testimony of Elmer Lysfjord.)

recall the exact date—and at that time I met Mr. Waldron and Mr. Ragland there, and then he told us—Mr. Ragland told us—that the Hilo plant was closing down and that we had better do something to get some tile or we would be out of tile for some two or three months.

And we had no method or manner of obtaining any tile, purchasing it or otherwise, at that time. So we——

Q. What do you mean by that? You didn't have a purchase order blank?

A. That is correct. I don't think that we even had a piece of paper to write on at that time, just a warehouse with [367] a number on it, that is all.

So I either left by myself or we went in the same car, the three of us, down to a stationery store and purchased a small purchase order book, a very common variety that you buy for 30 cents, 40 cents, something like that.

Q. Did you make that purchase?

A. Did I make it?

Q. Yes. A. Yes, sir.

Q. All right. Go ahead.

A. From that time we went to the Plantation, a restaurant on Firestone and Long Beach Boulevard, had lunch, and Mr. Ragland wrote up the order because, frankly, we didn't know how to write up an order, we had never done so before in the manner that would be acceptable to his company.

So Mr. Ragland wrote up the order, and Mr. Waldron signed it, and there was one little incident

(Testimony of Elmer Lysfjord.)

that was pretty funny about it, I think, we didn't even put a name on it to begin with.

Q. You didn't have the aabeta company name on it?

A. At that time, no. We had lunch and then pretty soon in discussing it a little further we decided perhaps if we were going to buy something we ought to have a name on it. So then we put our name on it.

Q. Did you put the aabeta company name [368] on it? A. Yes, sir.

Q. Do you recall whether or not that book had numbered pages on it?

A. I am sure that it did have.

Q. What else occurred at this meeting where you ordered the first tile? Did you ever hear anything more about the order?

A. Well, Mr. Ragland took the original with him and we discussed the amount of area required to hold a carload of tile.

Q. At this meeting?

A. At this meeting, yes.

Q. Go ahead.

A. And our Atlantic Avenue address was a very small place, it couldn't have held 50 boxes of tile with any scaffolding that would go along with the use of it, so Waldron suggested that we use the warehouse of the California Decorating Company, a quite large area, and as we had to have the material shipped at one spot, that was the only place that we could have it shipped at that time. And we

(Testimony of Elmer Lysfjord.)

made arrangements that if we were able to locate another warehouse adequate to hold this tile that we would divert it at a later date, bring it into Los Angeles or ship it to Los Angeles.

Q. Your original shipping orders, I take it, then contained the California Decorating address in San Bernardino? [369] A. That is true.

Q. That is on Pacific Avenue over there, is that it? A. I believe that is right. [370]

Q. Very well. What else occurred? Did Mr. Ragland take the order when he left?

A. Yes, sir.

Q. And as far as you personally are concerned, did you personally change that shipping address at any time with the Flintkote people, Baymiller, Ragland or Thompson? A. No.

Q. Do you know where it was delivered?

A. To my knowledge it was directed to the Pacific Avenue address of the California Decorating Company, and then diverted from there to a warehouse Mr. Waldron had obtained shortly before that in San Bernardino.

Q. You personally did not divert it, I take it?

A. No, sir.

Q. Now, Mr. Lysfjord, did you have anything to do with the installation of telephone or listing or renting of warehouses in San Bernardino?

A. No, sir.

Q. That was Mr. Waldron's work there, was it not? I mean he did that? A. Yes, sir.

Q. Do you know whether or not Mr. Waldron

(Testimony of Elmer Lysfjord.)

made arrangements—well, the leases, I think, speak for themselves.

Now, Mr. Lysfjord, when, after you got your telephone listing and after you made your first order for Flintkote [371] tile, when did you next meet Mr. Ragland in connection with Flintkote tile?

A. Oh, I met him quite a few times in the general course of business, if that is what you are referring to.

Q. Where did you meet him? Where did you see him? Did he ever come to the Atlantic address after that? A. Oh, yes, indeed; yes, indeed.

Q. How many times?

A. Oh, any number of times.

Q. What would be the occasion for his visits?

A. I think Mr. Ragland was generally interested in the success of aabeta co.

Q. So it was a matter of personal interest and so on?

A. I am quite sure it was that. He seemed to want to do most everything in his power to help us in any manner to become a success, and he understood the difficulty of starting a new company and the problems, little problems that come up that are not too familiar to us at the time and he offered suggestions along the line, what to do.

Q. Is there any doubt in your mind—you state positively that Mr. Ragland then was aware, at the Atlantic Avenue address, prior to, say, the middle of January, 1952?

(Testimony of Elmer Lysfjord.)

A. Oh, yes, sir, very definitely so.

Q. He had been there at that address personally in your presence prior to that time? [372]

A. Yes, sir.

Q. Do you recall a meeting at the Atlantic address with Mr. Ragland in or about that time? Give a week or a few days.

A. Are you referring to a specific meeting?

Q. Yes. Did Mr. Ragland ever come out there and inform you in anywise of any complaint about your going into business? A. Oh, yes.

Q. You recall such a meeting?

A. Yes, indeed.

Q. Where did it occur?

A. At the Atlantic Avenue office.

Q. When did it occur?

A. I just thought he was going to say something. I am sorry.

The Court: He is waiting to see that all the preliminary questions are asked and answered first, and if they are he will probably sit down.

Q. (By Mr. Ackerson): When did it occur, Mr. Lysfjord, about when?

A. The latter part of January, perhaps first of February.

Q. It was before this termination meeting?

A. Yes. [373]

Q. At least? A. Yes.

Q. And it occurred at the Atlantic Avenue address? A. Yes, sir.

Q. What was said by Mr. Ragland?

(Testimony of Elmer Lysfjord.)

Mr. Black: That, if the court please, is objected to on the ground that this question calls for the eliciting from this witness of some narrative of a past event, that the witness presumably is about to state that Mr. Ragland told him about other people making, having made complaints to the Flintkote Company.

The Court: Is Mr. Ragland contended to be a conspirator?

Mr. Ackerson: He certainly is, as an agent of Flintkote. I think the entire evidence shows it.

Mr. Black: The court please, there cannot be such a thing as a conspiracy between the corporation or its own employees or agents, unless they are acting outside of the scope of their authority. In this situation the only named defendant is the Flintkote Company.

The Court: The Flintkote Company is an artificial person. It would have to act through its officers and employees, wouldn't it?

And I take it to be Mr. Ackerson's theory that the acts of Ragland in this situation were the acts of Flintkote.

Mr. Ackerson: They certainly followed every act of [374] Ragland, including the termination date.

Mr. Black: The principle we are relying on is a simple point of law of agency. This man is shown to have been an employee of the Flintkote Company. To be sure, there is absolutely no evidence as to the extent of his authority.

(Testimony of Elmer Lysfjord.)

The question seems to call for a narration of a past event; not anything done by the declarant himself. It comes under the general rule that Wigmore states in very simple terms as follows:

"Declarations or admissions by an agent on his own authority and not accompanying the making of a contract or the doing of an act on behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being a part of the res gestae and are not admissible in evidence but come within the general rule of law excluding hearsay evidence, being but an account or statement by an agent of what is past or been done or admitted to have been done. Not a part of the transaction but only statements or admissions respecting it."

That is Section 1078 of Wigmore's text, Vol. 4.

Again on the same principle, Fletcher on Corporation, Section 735, pages 734 to 735:

"It is elementary that an agent cannot bind [375] his principal by declarations which are merely historical and which have no connection with any transaction then being conducted by him, with authority, for his principal. The principle of the exclusion of such evidence is the same as obtains in the ordinary relationship of principal and agent.

"The statements of the latter are inadmissible to affect the former unless, in respect to a transaction in which he is authorized to appear for the principal and he has no authority to bind his principal by any statements as to bygone transactions.

(Testimony of Elmer Lysfjord.)

Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties."

Now, we submit in that situation it calls for pure hearsay. No proper foundation has been laid. And that the ordinary rule of principal and agent is applicable to this situation, and the authority of this agent doesn't extend to the making of declarations of past events.

The Court: The court understands that it is offered as a present act, that is, present as of the time it was done, then being an overt act in furtherance of the conspiracy.

Mr. Ackerson: The admission of an overt act in furtherance of the conspiracy.

The Court: What date?

Mr. Ackerson: Prior to the meeting. It is prior to the termination date. [377]

The Court: Do you want to argue it, Mr. Ackerson?

Mr. Ackerson: Yes, your Honor. I think the evidence here, throughout the evidence Flintkote has shown to have acted with respect to these clients of mine through Ragland, among others. That is the only way Flintkote could act.

Mr. Ragland was nine-tenths of the acoustical management of Flintkote. I mean that was his direct job.

(Testimony of Elmer Lysfjord.)

The Court: Are you telling——

Mr. Ackerson: I don't think that is disputed. He didn't handle——

Mr. Black: On the contrary——

The Court: Does the evidence show that? If it doesn't, you had better get it in.

Mr. Ackerson: Well, that can be gotten in.

Mr. Black: I may submit——

Mr. Ackerson: I didn't think it would be denied.

Mr. Black: ——the evidence shows that Ragland had no authority whatever to make a decision, that he had to submit it in turn to Baymiller who, in turn, had to submit it to Mr. Thompson who, in turn, had to submit it to Mr. Harkins before anything binding on this company could be done.

The evidence merely shows this man was a salesman. You might as well try to argue that the hosiery girl at Robinson's binds the president of the company. [378]

Mr. Ackerson: I am not arguing about binding the company as a corporate matter except in a case of conspiracy here. In a case of conspiracy the company has been shown, in fact, to have acted through Mr. Ragland.

These conversations are being introduced for the purpose of obtaining an admission through Mr. Ragland of the Flintkote Company of the very matters in issue, the very overt acts in issue.

I don't think we are bound by the ordinary law of ultra vires acts of an agent of a corporation. After all, I think that it is a question of what

(Testimony of Elmer Lysfjord.)

occurred at the Flintkote offices, it isn't a question of some piece of hearsay that the company couldn't conceivably rebut.

I don't believe we have to go so far as to show technical corporate authorization through the minute books of the corporation. Ragland has throughout this testimony acted for the Flintkote Company, and the Flintkote Company has done exactly as Ragland has stated it did or would do, even including the termination agreement that has heretofore been testified to.

I think we are offering it, your Honor, as an admission on the part of Flintkote, that is true, and I can go into Ragland's authority later and postpone the conversation if your Honor feels that it is necessary. But I don't think we have to go that far. Ragland has been shown to have acted [379] for the corporation, both in bringing these people together and giving them the line of supply and he has acted the same as Baymiller and Harkins, and so forth.

We could be called upon, I guess, to explain Mr. Harkins' authority or Mr. Thompson's authority for cutting these people out of their supply on the theory of Mr. Black.

Mr. Black: No, we are talking about one simple thing, your Honor please. The general rule—this is stated in Bracton v. Bracton Fruit Juice Company, 208 NY 492, one of the cases supporting the text—"The general rule is quite elementary that an agent may not bind his principal by declarations

(Testimony of Elmer Lysfjord.)

which are merely historical and which have no connection with any transaction then being conducted by him with authority for his principal."

Mr. Ackerson: This is not historical. I don't like to argue the evidence in advance, but I have indicated——

The Court: The court invited it because we have great respect for Mr. Black's ability and I know he would not be urging an objection here unless he thought it a sound objection.

Mr. Ackerson: I am sure of that.

The Court: I can best test these things by hearing both of you argue them. Then you might convince me sufficiently so that you might get me to go into chambers and read a book on it. But ordinarily I am for argument if it follows [380] in its place.

Mr. Ackerson: In other words, this is an attempt, I mean one such statement I believe is already in evidence, but this is an attempt to introduce an admission in the form of an overt act, the basis, the purpose, or the subsequent overt act of termination that is directly in dispute here.

The Court: Objection overruled.

Q. (By Mr. Ackerson): Will you state your conversation with Mr. Ragland on that occasion in January or February prior to the termination meeting?

A. Well, Mr. Ragland came into the office, met me at the office, and mentioned that in his words, things were getting a little bit hot. He said that

(Testimony of Elmer Lysfjord.)

pressure that you were talking about is starting to show up. The competitors of yours in the field are beginning to pick up your figures and the fact that you are bidding against them around in this general area.

The manager of Howard Company, Mr. Howard, and Mr. Gustave Krause from Coast Insulating, a Sidney Lewis of Flintkote Company—I believe one of the principals there—and Mr. Newport, all had a meeting.

Q. Who is Mr. Newport?

A. He is a principal of Coast Insulating. All of these are Flintkote dealers, incidentally. [381]

The Court: Are you telling this as a conversation?

The Witness: I am saying what Mr. Ragland told me.

The Court: Very well.

The Witness: That they had this meeting objecting very strenuously to the fact that we were in business, the aabeta company was in business.

One of the very strongest statements was from Mr. Newport, saying that he would boycott, I believe the word was, all of Flintkote's materials and see that it wasn't used in the area, and he was willing to spend $40,000 or $50,000 to do it.

Mr. Black: Just one moment.

I renew our objection, if the Court please. It is now perfectly apparent that this is a narration of alleged events that are purported to have occurred in the past, that it is pure hearsay under

(Testimony of Elmer Lysfjord.)

the law and the well settled rule of substantive law of principal and agent, and that the witness is attempting to relate something that has nothing to do with any duty that Ragland was then performing but merely purports to be something that Ragland told him as to some events that had occurred sometime prior.

The Court: The witness having answered, you want to make that as a motion to strike?

Mr. Black: I make that as a motion to strike.

The Court: If so expansive a tort as conspiracy has a res gestae which runs over the period of the conspiracy, [382] suppose it does, this would be part of the res gestae.

Mr. Ackerson: It would be part of the res gestae.

The Court: And would be admissible then. When I say it would be part of, it would be evidence of, not undertaking to make it binding or to indicate what weight should be given to it.

The motion is denied.

Q. (By Mr. Ackerson): Did Mr. Ragland state the conversation of Mr. R. E. Howard on this occasion?

A. Only that he objected very violently. I don't recall the exact words.

Q. What about any statement to Mr. Ragland by Mr. Gustave Krause?

A. I don't recall that he said any more at that time. However, there was another meeting where

(Testimony of Elmer Lysfjord.)

Mr. Gustave Krause did state very violently what he thought of us going into business.

Q. Who told you that?

Mr. Black: That is objected to.

Mr. Ackerson: Yes, you may strike that.

The Court: Yes. Strike the part of the answer that said that he state violently.

You can't characterize a statement as expansive, violent, kindly, gratuitously, gratefully or anything else; you [383] have to just tell us what was said and the jury will have to decide with what motive it was said.

Q. (By Mr. Ackerson): Did Mr. Ragland relate this conversation to you by Mr. Krause?

A. Yes, sir.

Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?

Mr. Black: It will be understood of course that our objection runs to all of this?

The Court: Are you speaking to the objection you urged last week?

Mr. Black: Yes, the objection that it is pure hearsay, that there is no authority in the agent to narrate past events.

The Court: I will understand it but it is just the nature of things that ultimately the examination will shift to something else and sometimes these transitions are so gradual that it is a little difficult to keep track, but I understand that it runs to this one.

Mr. Black: I don't want to keep interrupting, if

(Testimony of Elmer Lysfjord.)

the Court please, but I do want our record perfected on this point.

The Court: Surely.

The Witness: What was the question again?

Mr. Ackerson: Will you read the question, Mr. Reporter? [384]

(The question referred to was read by the reporter as follows: "Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?")

Mr. Ackerson: That is concerning Ragland's conversation with Mr. Krause.

The Witness: Mr. Ragland told me that Mr. Krause came into the office and talked——

Q. (By Mr. Ackerson): Into the Flintkote office?

A. Into the Flintkote office, and talked so loudly to Mr. Ragland and pounded on the desk a little bit that Mr. Ragland got up and left and told Mr. Krause that if he couldn't talk as a gentleman he didn't want to talk to him any more, and until such time as he could behave as a gentleman, that he, Ragland, would come back and talk with him.

Q. Did Mr. Ragland say what Mr. Krause was talking about?

A. He was objecting very strenuously to the aabeta company being in business.

The Court: You cannot say he was objecting. That is a conclusion. You have to tell us what was said and then the jury can decide whether he ob-

(Testimony of Elmer Lysfjord.)

jected to something or applauded, or something in between.

The Witness: Well, I don't know how else to say it [385] because that was what he was doing.

Mr. Black: You weren't there.

The Court: That is what he was doing? You tell us what he said. Of course you cannot remember it word for word, but you can say in substance he said A, B, C, D, and so forth, and go ahead and relate the substance of the conversations. Then it will be up to the jury to determine whether that was an objection or not.

The Witness: I don't know quite how to answer that.

Q. (By Mr. Ackerson): Did Mr. Ragland—are you relating Mr. Ragland's words to you as far as the word "objection" goes, or did Mr. Ragland say Mr. Krause used other words?

A. He used the word "objected." He said, "I object very much to the aabeta company being in business, in competition with us, using the same type of tile." That is why I keep saying "objected." That is the word he used.

The Court: If that is the word he used, that is all right. I thought you were using a word which you thought his words added up to.

The Witness: Oh, no. Mr. Krause very definitely said those words, as I recall what Mr. Ragland told me, that he objected very strenuously to the aabeta company. He used the words "I object to the aabeta company being in business here in the Los

(Testimony of Elmer Lysfjord.)

Angeles area, using the same type of acoustical [386] tile that we are a dealer for."

And that is the time when Mr. Ragland decided to leave, not wanting to listen to the loud conversation, and he told me it was loud. That is not my assumption. He said he didn't like it, so he left. He left for about 10 minutes as I understand it—or I was told rather—and then went back and talked further with Mr. Krause. What they talked further about, I do not know. [387]

Mr. Ackerson: Now, if your Honor please, I am about to change to a different subject. Is this a convenient time for our recess?

The Court: Yes, it is.

Now, members of the jury, and counsel. We have a case pending in this court, it has been pending here for about three years, which is a long time for a criminal case to pend. It concerns a person who is in very poor health, and naturally he would like to say that he is innocent, he would like to get out from under the onus of the case, and the prosecutor would like to have the issue tried, so the court has agreed to try the case short hours in keeping with the physical ability of this witness to stand about two hours a day of trial.

As a result of that we are going to start on that trial tomorrow morning at 9:30 and run until about noon, and so on, until it finishes. In looking at the file, it looks like about a two- or three-day case. It may turn out to be longer. So while we are living

(Testimony of Elmer Lysfjord.)

with that problem we will just have to spend afternoons on this case.

I will try to give you substantially the same number of hours as you would get if I were a little overinclined to take things a little easy. So we will convene at 1:30 and run until about 4:30 or 4:45, starting tomorrow.

We are adjourned until 1:30 tomorrow.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 1:30 p.m., Tuesday, May 10, 1955.) [388]

May 10, 1955; 2:00 P.M.

Mr. Black: May it please the court, I was noticing in the transcript that the citation as to Wigmore on evidence was incorrectly stated. It might have been my own fault. Just for the record I thought I had better correct that record to show that the section of Wigmore to which I referred was Section 1078.

The Court: Where does that occur in the transcript?

Mr. Black: That was almost at the end of the session last evening.

The Court: Page 375.

Mr. Black: Yes, page 375, line 22. Instead of 1075 it should read 1078, and that is in Volume 4.

Also I noticed I apparently talked too fast for the reporter to get the citation of a case I referred to, on page 380, the citation of that Brocton case,

(Testimony of Elmer Lysfjord.)

State Bank of Brocton v. Brocton Fruit Juice Company, 208 New York 492; 102 Northeastern 591.

The Court: The transcript is amended by showing the insertions that counsel has indicated.

These transcripts are sometimes used for a considerable period of time after the immediate experience of the trial. I will appreciate it whenever there are errors which are noted by counsel that you bring them to our attention so that [390] we might take care of them chronologically.

Mr. Black: Be glad to.

Mr. Ackerson: Yes.

ELMER LYSFJORD

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Lysfjord, during the last session of court I was asking you about your original order of stationery, and I was unable at that time to find Exhibit 4.

I am going to show you Exhibit 4 in evidence, Plaintiffs' Exhibit 4 in evidence, and ask you if this is part of the original stationery order, and I am calling your attention to a calling card, to a business card, and to a green sheet here titled aabeta company, and so forth. A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. Is that part of the original order?

A. Yes.

Q. And, Mr. Lysfjord, do you notice that on the calling card you have a two-colored job, that is, red and blue—I am slightly color-blind, but that is true, is it? A. That is true.

Q. And there are two colors on it?

A. Yes, sir. [391]

Q. And do you notice that after aabeta company you have two addresses?

A. We have two telephone numbers.

Mr. Black: Two telephone numbers.

Q. (By Mr. Ackerson): Two telephone numbers? A. Yes.

Q. Now on the sheet, the large sheet, after aabeta company do you see that there are two addresses and two phone numbers? A. Yes, sir.

Q. What are those addresses?

A. 7302 South Atlantic Avenue, Los Angeles, and 901 North Waterman Avenue, San Bernardino.

Q. And as you have stated this is the original order of stationery for aabeta company after you became a Flintkote distributor?

A. Yes, sir.

Mr. Ackerson: May I show this to the jury, please?

(The exhibit referred to was passed to the jury.)

Q. (By Mr. Ackerson): Now again calling your attention to your testimony of yesterday, Mr. Lys-

(Testimony of Elmer Lysfjord.)

fjord, I believe you stated that as a reason for ordering this first carload of tile Mr. Ragland stated to you that the Hilo plant may be closed down for repairs [392] and you should have something on hand, is that about the gist of your testimony on that point? A. That is correct.

Mr. Ackerson: Mr. Black, may we introduce this communication, a copy of a communication, which you furnished us from The Flintkote Company?

(Exhibiting document to counsel.)

Mr. Ackerson: May I have this marked plaintiffs' exhibit for identification next in order?

The Clerk: Plaintiffs' Exhibit 37 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 37 for identification.) [393]

Mr. Ackerson: I have been informed, I think the record should show, that defendant's counsel have informed me that the date on this letter was October 24, 1951. I have changed it to that by pencil interlineation.

May I offer that without objection, Mr. Black?

Mr. Black: No objection.

Mr. Ackerson: I will offer it then.

The Court: Received.

The Clerk: Plaintiffs' 37 in evidence.

(The document heretofore marked Plaintiffs' Exhibit 37 was received in evidence.)

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: I will read portions of this letter, with the understanding that this is a copy of the letter supplied to the plaintiffs at their request by The Flintkote Company.

It is in the form of a memorandum, apparently either from or to George J. Pecaro, or, from or to K. W. Sauer, Hilo. It is dated October 24, 1951, and the title is "Anticipated Hilo Operation for November and December, 1951."

"Dear George:"—so it is to Mr. Pecaro.

"Mr. Tonjes advises that our Hotwell has been promised for delivery at Hilo December 2nd. We would like to make the Hotwell installation simultaneously with the turbine inspection and I am listing below our tentative operating plans [394] for the months of November and December.

"During November, we plan to operate against incoming orders, maintain an inventory of popular stock items and slightly increase our inventory of certain acoustical tile items. Through a copy of this letter, I am asking Mr. Lewis to advise me regarding the sales department's anticipated needs for bricksiding for the month of December. If substantial quantities of bricksiding blanks are needed during the month of December, we may have to manufacture and stock this commodity during the latter part of November."

Then the letter goes on and indicates that there will be a temporary shutdown for repairs or additions.

I think it might be stated, or, stipulated, Mr.

(Testimony of Elmer Lysfjord.)

Black, that the Mr. Lewis mentioned here is Mr. Sidney Lewis of The Flintkote Company, the general sales manager.

Mr. Black: Yes.

Q. (By Mr. Ackerson): I have called your attention to Exhibit 4, which contains the Owens Roofing job estimate sheets, as written partly on the stationery we have been talking about.

Did you personally ever know either of the Mr. McLanes connected with the Owens Roofing Company? A. No, sir. [395]

Q. Have you ever met them? A. No, sir.

Q. Have you ever seen them, to your knowledge?

A. No, sir.

Q. Have you ever had any contact with the Owens Roofing Company prior to the installation of this job? A. No, sir.

Mr. Ackerson: May I have Exhibit 9?

Mr. Clerk: Yes, sir.

Q. (By Mr. Ackerson): Mr. Lysfjord, I show you Plaintiffs' Exhibit 9 in evidence, and ask you if you have ever seen that document.

A. Yes, sir.

Q. Will you state to the jury and the court where you first saw it?

A. I opened an envelope at the Bell address of the aabeta co. and took this piece of paper out of the envelope.

Q. Do you recall——

Mr. Ackerson: I think the document speaks for

(Testimony of Elmer Lysfjord.)

itself. This is the document which previously has been called to the jury's attention.

It is the request for a bid by the California University for this Santa Barbara job. It is dated January 16, 1952. It is addressed to The Flintkote Company from the University of California, and the witness has stated he received it at [396] Bell address plant here in Los Angeles.

Q. (By Mr. Ackerson): Now, we were progressing yesterday, Mr. Lysfjord, on your contacts with representatives of The Flintkote Company.

Will you describe how and under what circumstances your supply of Flintkote tile was terminated?

Give us the approximate date, if you can, how you were notified and what happened.

A. Well, I would say it was to the latter part of February—— [397]

Q. For 1952?

A. For 1952; yes, sir—or possibly the 1st of March.

I received a call at the Downer Company to meet Mr. Ragland and parties that he was to bring with him at the Bell address.

Q. Did Mr. Ragland tell you what the meeting was about? A. No, sir.

Q. Very well. Proceed.

A. He told me that I was to contact Mr. Waldron and have him there too at the same time, which I did. I contacted him in San Bernardino and had him come in and meet at this particular date with

(Testimony of Elmer Lysfjord.)

Mr. Ragland and whoever he was to bring with him.

Q. Very well. Then what happened?

A. Well, I did meet him there and at that time Mr. Waldron hadn't arrived, and we talked of general things, the weather and what have you, until such a time as Mr. Waldron arrived.

Q. Prior to the arrival of Mr. Waldron was anything said about your Los Angeles operation, Flintkote tile, or anything of the sort?

A. No, sir.

Q. Then Mr. Waldron arrived from San Bernardino? A. Yes. [398]

Q. Will you proceed from there?

A. Well, Mr. Thompson said that they were very sorry but from this time on they were unable to supply us with Flintkote tile.

Q. What did you say, if anything?

A. I was rather surprised. I couldn't understand why.

Q. Did you tell him that?

A. I asked him very definitely, why.

He said, "Well, you are not doing things according to the way we thought you were going to do them."

I said, "What are you referring to? What is that you want us to do or that we are not doing that you did want us to do?"

And then I believe Mr. Waldron mentioned, "I guess the pressure started to work a little bit more

(Testimony of Elmer Lysfjord.)

than you anticipated and that you are becoming worried about it."

Then the conversation changed from Thompson talking to me to Mr. Thompson talking to Waldron, and I believe Mr. Waldron has already stated his part of that conversation.

Q. How long did this conference last?

A. Probably a half hour or something like that.

Q. Was anything else stated during this period, any other conversation with respect to your business or otherwise?

A. Well, Mr. Waldron again mentioned that he was quite [399] surprised that the question that we all anticipated was great enough that it would influence the Flintkote Company. And Mr. Baymiller admitted that there had been a considerable amount of pressure placed on them.

Mr. Black: That is objected to as calling for a conclusion of the witness.

The Court: The words beginning with "admitted" and all the rest of the answer from that word on is stricken.

You will have to bear in mind, Mr. Lysfjord, that you must tell us what was said and not your interpretation of what was said. That is, do not edit to the extent that you give us the conclusion or the opinion. You have to of course edit a little because you can't remember the exact words, but what we want here is the substance of a conversation and not your opinion of what the conversation admitted, concluded or argued.

(Testimony of Elmer Lysfjord.)

The Witness: I didn't mean it to be anything like that. What words have I used?

The Court: You said "He admitted," and then you went on to tell what he admitted. Now if you will tell us what he said the jury can decide whether he admitted or whether he did something else.

The Witness: Well, Mr. Baymiller stated that there was considerable pressure brought to bear.

Then Mr. Thompson interjected his opinion, or his [400] statement, I should say—I can't use the word "opinion," I guess—that it was completely out of their hands, and that would be Mr. Baymiller and Mr. Thompson, and that the higher-ups in their company had instructed them that Flintkote would no longer sell the aabeta company acoustical tile.

Q. (By Mr. Ackerson): Now at this meeting or since this meeting or otherwise, have you ever received anything in writing from The Flintkote Company in connection with their termination of your supplies? A. No, sir.

Q. Never one scratch of writing?

A. No, sir.

Q. No official notice of writing?

A. No, sir.

Q. No written notice requesting the meeting?

Mr. Black: That is objected to—pardon me.

The Court: Is it objected to or is it not?

Mr. Black: I will withdraw it.

Q. (By Mr. Ackerson): You received no written notice calling for the meeting? A. No, sir.

Q. Did you ever receive any written instructions,

(Testimony of Elmer Lysfjord.)

notice or otherwise pertaining to any objection Flintkote [401] ever had to your operations as aabeta company? A. No, sir.

Q. And that statement applies up to the present date, does it? A. Yes, sir.

Q. Now, Mr. Lysfjord, I am going to direct your attention to the time when you were with the Downer Company, that is, the R. W. Downer Company. I think you have stated you were a salesman for them? A. That is correct.

Q. Did you ever attend any meetings of the acoustical tile contractors as a representative of the Downer Company?

A. I attended several meetings but I can't say for sure that they were known as the acoustical tile contractors at that time.

Q. Were they attended by contractors, acoustical tile contractors? A. Yes, sir.

Q. When was the first meeting that you attended? Do you recall that?

A. I would say it was about 1950.

Q. Do you recall where it was?

A. In Burbank on, I believe the street name was, Hollywood Way.

Q. Do you recall the name of the building? [402]

A. It was a store building. There was no name to it.

Q. Do you recall any of the people who attended that meeting?

A. Yes, sir, very well. A Mr. William Arthur——

(Testimony of Elmer Lysfjord.)

Q. Who was Mr. William Arthur?

A. He was the sales manager for the Harold E. Shugart Company.

A. Mr. Dorman——

Q. Who was Mr. Dorman?

A. He was the estimator for Coast Insulating Company.

Q. Anyone else?

A. A Mr. Lewis A. Downer, a salesman for R. W. Downer Company.

Mr. Anthony Wellman, an estimator or perhaps at that time a salesman—he was first a salesman and then the house estimator—for the R. W. Downer Company.

Mr. Howard Smith, the estimator for Harold E. Shugart Company.

Q. Was that the same Mr. Howard Smith who was on the witness stand yesterday?

A. Yes, sir.

Q. Very well. Who else?

A. I believe a Mr. Smith from Sound Control Company.

Also a Mr. Hollenbeck who, for lack of a proper word, I would say the moderator, the man in charge, the—well [403] that is the best that I can put it.

Q. Now this was some time in 1950, you think?

A. Yes, sir.

Q. What happened when you arrived at this meeting? A. Well——

Mr. Black: Just one moment, please.

At this time we object to this line of testimony

(Testimony of Elmer Lysfjord.)

on the ground that no connection with the defendant Flintkote Company has been shown, in point of time it is too remote to have any connection with the events in this case, and for all the reasons that were urged in connection with the testimony with respect to the acts of alleged co-conspirators other than The Flintkote Company.

The Court: The objection is overruled, subject to a motion to strike.

Mr. Ackerson: Thank you.

Q. Will you relate what happened when you arrived at this meeting—first let me ask you, was Mr. Waldron there? A. No, sir. [404]

Q. What happened when you arrived at this meeting?

A. Well, we were all personal friends, salesmen in the field, had become acquainted from time to time or had met from time to time and become acquainted bidding against each other for these acoustical jobs.

Then Mr. Hollenbeck called the metting to order and explained to us that——

Q. What did he say?

A. Well, we were gathered there for the expressed reason that the takeoffs that each of us had presented to him in the past were so inaccurate, in his estimation, he thought perhaps if we were all to be there at one time and discuss methods and manner of taking off or estimating acoustical jobs we probably could be more closely in line.

That it was rather difficult for him to figure out

(Testimony of Elmer Lysfjord.)

just what we were all talking about when we turned these estimates in to him.

Q. All right. Did anyone else say anything?

A. Well, they chose—I mean the group chose Mr. Smith to give a demonstration as to the proper method of taking off or evaluating the amount of acoustical tile that would go into a particular building.

They had a set of plans there they were going to use, that Mr. Smith was going to use to instruct us in this matter. [405]

Mr. Smith at that time presented each of us with a pad of identical takeoff sheets that we were to use to place this information in an orderly manner, that would be acceptable to Mr. Hollenbeck.

Q. Did Mr. Hollenbeck, was he connected with any particular acoustical tile company, to your knowledge? A. Not to my knowledge.

Q. All right. What did Mr. Smith do then? He presented these pads.

A. He proceeded to tell us exactly the manner he felt was proper in the approach of taking off acoustical job, tile job, and starting with the reading of the specifications and how it should be interpreted and placed on this particular sheet.

The measuring of the dimensions per room, the amount of rooms, the type of installation required, whether they were to be installed, or, rather, it was—the tile I am speaking of—was to be installed on 2 x 2 stripping, maybe 1 x 3 or perhaps cemented to an existing ceiling or a sheetrock backing, things

(Testimony of Elmer Lysfjord.)

like that that are very pertinent to the installation of acoustical tile.

Q. Did any of the audience have anything to say at this meeting?

A. There were general suggestions from most people. Mr. Hollenbeck asked me if I would like to offer some [406] particular manner that I thought was a good way to take off acoustical tile, and I refused to do so.

He asked me why I refused to do so.

And I told him that I didn't feel that I wanted to tell any competitors of mine the manner and the method I had learned through the years, as to getting acoustical tile off.

At that time Mr. Arthur interjected some of his conversation—he was a senior member, Mr. Arthur was a senior member at the time. In other words, he was the most responsible employee, shall I say, for all these firms.

Mr. Arthur said to me, "Weren't you instructed to do exactly what you were told at this meeting?"

I said, "Yes, I was told that, but that doesn't necessarily mean I am going to do that."

And he said, "Well, I am going to see that you do do it."

I said, "Well, that remains to be seen."

Q. Well, did you instruct them or tell them your method of taking it off?

A. No, sir, I did not. I had no intentions of imparting any of my knowledge to a competitor of mine, to hamper me in earning a living, because I

(Testimony of Elmer Lysfjord.)

was on commission. They weren't paying me one cent, other than what I earned myself.

Any job I was fortunate in getting and bringing in to the Downer Company, that we would be associated in doing, I got a commission for. [407]

If I were intelligent enough to be able to make money on the job I received my portion. If I were stupid enough to make a mistake and I lost money, or, rather, the company lost money, the group, shall I say—not group—the two of us lost money, I would have to contribute my share to the loss.

I didn't feel that I wanted to at any time help any one of my competitors to take some of my money out of my pocket, so to speak.

Q. So you did not make the speech?

A. No, sir.

Q. Did anyone else have anything to say at this meeting?

A. There was a great deal said. I don't know just exactly how to answer the question.

Q. How long did the meeting last?

A. Probably an hour.

Q. Did Mr. Hollenbeck have anything else to say? A. I don't believe, so, at that time.

Q. Was that the only meeting you attended where Mr. Hollenbeck presided?

A. No, I attended one more in the general area of the first meeting. It was approximately the same operation as I have discussed with you in the past here.

(Testimony of Elmer Lysfjord.)

Q. Did you attend any other meeting? Is that the [408] only other meeting you attended where Mr. Hollenbeck was?

A. No, I attended one more at the Rodger Young Auditorium. It is a cafe, I believe, although the name in misleading.

Q. Tell us what occurred at this Rodger Young Auditorium meeting, will you?

A. It was a dinner, quite a large turnout. I believe there were two or three representatives from each of the acoustical contractors that were in business at that time.

Q. Whom did you represent, Downer Company?

A. Yes, sir.

Q. Mr. Waldron, was he at that meeting?

A. Yes, sir.

Q. Who represented the other companies? Just name as many as you can.

A. Howard Smith for Shugart Company. Mr. Tony Wellman for Howard Company. And Mr. Howard of the Howard Company.

Q. The same Mr. Howard that was here yesterday?

A. Yes, sir. Mr. Arnett of the Downer Company.

Q. Yourself and Mr. Waldron of the Downer Company, I take it? A. Yes, sir.

Q. Who else?

A. Mr. Jim Birchendall of the Shugart Company. A Mr. Jim Ballard of the Shugart Company. Mr. Smith of Sound [409] Control Company. A

(Testimony of Elmer Lysfjord.)

Mr. Nichols, I believe, if I recall the name correctly, from the L. D. Reeder Company.

Q. Were most of the acoustical tile contractors operating in this area represented by one or more people at that meeting?

A. They were all represented at that meeting.

Q. All of them? A. Yes, sir.

Q. Do you have an approximation of the date of this meeting? A. I believe it was 1951.

Q. Now, what transpired at this meeting?

Mr. Black: Of course, the court understands this is the same line of questioning to which we objected and for the same grounds.

The Court: The court makes the same ruling, which is a provisional ruling. The objection is overruled, but I will reconsider it on a motion to strike at the close of all the plaintiffs' evidence.

Mr. Ackerson: Yes.

Q. (By Mr. Ackerson): Will you proceed, Mr. Lysfjord?

A. Well, this was approximately following the same lines that the other meetings followed, in that, or, rather, Mr. Hollenbeck again tried to convince all of the salesmen that it was very important that we followed somewhat the [410] same lines, so that he could evaluate our takeoffs more definitely.

And Mr. Smith again gave an example of a takeoff from a set of plans that were there at that time. And I believe that there wasn't too much attention paid to what Mr. Smith was saying. It became a—— [411]

(Testimony of Elmer Lysfjord.)

Q. That is a little bit opinionated, I would say, Mr. Lysfjord. But if there is any reason you have, or anything that was done or said, Mr. Lysfjord, that might have led you to that opinion you can state what was done or said. I think the court will permit you to do that.

A. Well, the salesmen became a little upset with——

Q. What did they say, Mr. Lysfjord? The jury has to decide whether they became upset or not. You will have to state something that occurred.

A. Could I say what I said?

Q. Yes. A. Would that be what you want?

Q. Yes. What did you say or what did anyone else say?

A. I talked directly to a Mr. Howard Smith and a Mr. Jim Birchenall, stating that I did not approve of anything that was being done there because it was interfering with my livelihood. And Mr. Birchenall said, "Well, it is interfering with mine too, but we are instructed to do so, so why don't we try to go along?"

And Mr. Smith said, "You not only should try, you are going to have to go along."

Q. Mr. Smith of what company?

A. The Shugart Company— "—with this general practice of submitting our bids to a clearing-house," if I might use that word. [412]

Q. You mean Mr. Hollenbeck?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

The Court: Did anyone use that word besides you?

The Witness: Clearinghouse?

The Court: That term "clearinghouse"?

The Witness: I don't recall, sir.

Q. (By Mr. Ackerson): Then you meant Mr. Hollenbeck and not the clearinghouse? That was your own term?

A. Mr. Hollenbeck, yes, sir.

Q. What were you to do, as you understood it?

A. Well, we were—or speaking for myself—I was instructed by the Downer Company to take off a particular job on the standard take-off sheet in duplicate, one that I was to retain, the other that I was, through one of the secretaries, send to Mr. Hollenbeck's address for a comparison of take-offs.

Q. Comparison with what take-offs?

A. Of other contractors who were to do the same.

Q. Did you do that? A. I did that.

Q. If you know, what did Mr. Hollenbeck do with these take-offs when he got them?

A. I know very well because it cost me a little money the first time I found out. [413]

I resented this take-off being sent in to the company, and I proceeded to bid the job which I would do ordinarily, and I was chastised by both Mr.——

Q. Wait a minute, Mr. Lysfjord. You can't state what happened. These words "chastise," and so forth, of course they may mean one thing to you and they may mean something else to the court, to the jury or to me. Just state if you can what

(Testimony of Elmer Lysfjord.)

happened. Now we were at the point where what did Mr. Hollenbeck do with these take-off sheets when he got them, if you know.

A. Well, I was trying to lead up to that as to how I knew what he did with them.

Q. Very well. Proceed, then. Just state the facts as best you can. I know this is a little difficult.

A. As I said, I bid the job with full intentions of getting the job for myself, which I did, and I did get the job. And Mr. Arnett and Mr. Downer, R. W. Sr.—he is dead now, but at the time he was alive—called me into their office and said, "We can't have any more of this."

I said, "I thought I was here to sell jobs."

They said, "Well, you are here to do what we tell you to."

And I said, "Well, I don't understand. What have I done wrong here?"

And he said, "Don't you realize that you had the low bid in there and you weren't supposed to bid." [414]

I said, "No, I have no idea that I wasn't supposed to bid. I thought the idea was to be the low bidder."

And he said, "Well, not with this arrangement we have for checking bids. They take the lowest bid of all the contracting bids that have been presented to Mr. Hollenbeck and he is not allowed to bid," and he said, "We were low bid and you are not allowed to bid," which made me very unhappy because that again cost me money.

Q. Well, now, did you ever have any conversa-

(Testimony of Elmer Lysfjord.)

tions with Mr. Arnett concerning this bidding matter? A. Quite a few.

Q. Will you state when and where and what the circumstances were?

A. In the year of 1950 and into 1951. They followed this general pattern, and I refused to go along with it in that the Downer Company was not paying me any salary, and the only way I could earn any money was to sell a job. And I would just take any job that I could find and try to sell it, and time and time again they would tell me, Mr. Arnett and Mr. R. W. Downer, that I would have to follow a pattern that they set up, that certain jobs were not to be bid by us, that they were being given to somebody else to bid.

Q. Did Mr. Arnett tell you that on any occasion?

A. Yes, sir.

Q. Can you think of any particular occasion or did it [415] happen frequently?

A. Frequently. As a matter of fact, Mr. R. W. Downer called me into his office one time and he said, "You must be Peck's bad boy."

I said, "Why do you say that?"

He said, "Well, you are doing everything contrary to what we tell you to do."

I said, "Well, if you want to give me $1,000 a month salary I will do anything you want me to do, but until such a time as you may pay me a salary then I will sell jobs whenever I find them and whenever I can."

He said, "Well, I think perhaps maybe we can't be associated any further."

(Testimony of Elmer Lysfjord.)

And I said, "That is your privilege. It is your company."

Q. Did he ever take any action along that line?

A. No, sir.

Q. Now, on how many occasions would you say that you had disagreements along that line with Mr. Arnett? A. With either one?

Q. Either R. W. Downer or Mr. Arnett.

A. Probably a dozen times.

Q. Who is Mr. Arnett again? What position does he occupy?

A. Well, he is the general sales manager and general [416] manager of the firm. I believe also that he is a vice president. The firm I am referring to is the R. W. Downer Company.

Q. Now, Mr. Lysfjord, during your experience as a salesman did you have any personal knowledge as to the manufacturer's list prices for one-half inch 12 x 12 acoustical AMA approved tile?

A. Yes, sir. [417]

Q. Do you have any knowledge whether your competitors and the Downer Company paid the same or different prices for that tile from the manufacturer?

A. Well, at one time I had in my possession the price list of the Simpson acoustical tile at the time I worked for Coast Insulating Company. I had a price list in my possession at the R. W. Downer Company, which handled Armstrong acoustical tile. I had in my own company the price list of The Flintkote Company.

(Testimony of Elmer Lysfjord.)

Q. Were there any differences in the prices?

A. In the large sizes there might be as much as a quarter of a cent difference. The basic tile, ½-inch 12 x 12 was identical.

Q. What was the price you had, these prices?

A. Ten cents a square foot.

Q. That is true with each company?

A. Yes.

Q. That is the price that you, as an acoustical tile contractor, could buy it if you had a factory connection? A. Yes, sir.

Q. Mr. Lysfjord, I am going to show you Plaintiffs' Exhibit 19 in evidence. Here is the first sheet, the first set of documents. I am also handing you Plaintiffs' Exhibit 29 for identification, which comprises the documents in this folder. [418]

In other words, Exhibit 19 is the first set of documents I have shown you. The second set in the folders here are for identification, and are Exhibit 29 for identification.

Now, Mr. Lysfjord, I ask you to look in the documents for identification and see if you can find the Howard bid for the John A. Sutter Elementary School. Can you do that without these documents?

Let's try the next one. I believe that one is missing, Mr. Lysfjord.

Let's take the addition to the Thompson School, Bellflower. Do you find that? A. Yes, sir.

Q. What does that record show, if you can tell, that the Howard Company bid on that job?

Mr. Black: The Court please, that is objected

(Testimony of Elmer Lysfjord.)

to for the same reasons we have been urging, namely, no connection shown with Defendant Flintkote Company.

And also I would like to make this request—and I believe Mr. Ackerson has no objection to it—in connection with all of these documents that were offered for identification yesterday, we attempted to examine them this morning, never having seen them at all, and we found Mr. Ackerson had them last night and had them all this morning at his office. We haven't seen them. We don't know what is in those files. [419]

They were simply produced in response to a subpoena. We, without prejudice to our objection, would like the privilege of reserving cross-examination on these documents, until we have had an opportunity of examining these voluminous files and seeing what they are.

The Court: Surely.

Mr. Ackerson: No objection to that.

The Court: You took them away last night, Mr. Ackerson. You might not object to Mr. Black taking them away tonight.

Mr. Ackerson: I think he should, your Honor. I had to have them for today's examination or I wouldn't have presumed upon the court.

The Court: Then he can examine them while we are engaged in our other case tomorrow morning and perhaps be ready to proceed in the afternoon.

Mr. Ackerson: Yes, your Honor.

Q. (By Mr. Ackerson): Do you find the bid for

(Testimony of Elmer Lysfjord.)

the addition to the Thompson School in Bellflower in that folder, Mr. Lysfjord? A. Yes, sir.

Q. What is the bid price of the Howard Company? A. $3,922.00.

Q. Is that broken down in any way?

Mr. Black: For the record, I am sorry to interrupt, but we must also interpose the further objection that there [420] is no foundation laid for these documents or questions.

The Court: Sustained on that ground.

Mr. Black: We just don't know. It is something that came out of somebody's files.

Mr. Ackerson: They were identified, I believe, yesterday as the documents for the specific jobs named in the duces tecum. The duces tecum specified the jobs exactly.

Mr. Black: Well, we still don't know what the documents are.

Mr. Ackerson: Very well. I misunderstood you.

Q. (By Mr. Ackerson): Mr. Lysfjord, referring to this folder on the addition to the Thompson School, can you identify, can you tell us what type of documents are in that folder?

A. Well, the document I am reading from now is a contract between Albert Reingard, general contractor, and the R. E. Howard Company, acoustical tile contractors, for the performance of installation of acoustical tile on the Bellflower school—the Thompson School of Bellflower; I am sorry.

Q. Are there any other documents in the file that you can explain to us?

(Testimony of Elmer Lysfjord.)

A. Here is a takeoff file showing exactly the amounts of material in the specific areas they are required. The types of material, the method of installation required—— [421]

Q. In other words, it is a regular takeoff sheet for the job, is it, identified as this Thompson deal, on its face? A. It doesn't seem to be——

Q. This contract, the quoted price on the contract itself was $3,922.00, is that right?

A. Yes, sir.

Mr. Ackerson: Mr. Black, I have these people under individual subpoenas. If further identification of these individual documents is necessary, I am wondering if we might stipulate that I might use them today in this examination, subject to a correction, identification, or whatever you want to do in the future about it.

I would like to offer them today, if I may, subject to your examination and motion to strike or whatever you wish tomorrow.

Is there any way we can work that out? In other words, I am merely taking—I merely wish to take the date off the files presented yesterday under subpoena and compare them to the date on this exhibit already in evidence.

The Court: Counsel, since you have something to work out here, I don't want you to have to do it under pressure by having the jury here. We will take our afternoon recess while you try to work out a stipulation, if you can.

(Short recess taken.) [422]

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: Your Honor please, Mr. Black and I have conferred about this during the recess. It is not the desire of either party to limit any objections or any rights of the other party, but for convenience and in the interest of time consumption we have agreed that these documents may be received in evidence, subject to the present motion of Mr. Black running throughout this type of testimony, and subject to any rights Mr. Black may have to object to the documents otherwise by motion to strike or otherwise, after he has had a chance to examine them. In other words, reserving full rights of Mr. Black to renew or add to objections after he has had a chance to examine them over the evening.

Mr. Black: That is our understanding.

Mr. Ackerson: Then I will offer this Exhibit 29 for identification in evidence.

The Court: 29 is received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 29.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, let's go to this first folder there relating to the addition to the Thompson School in Bellflower, and I will call your attention to the fact that on the Paintiffs' Exhibit 19 in evidence the Downer documents indicate a bid—indicates first that the job went to H. O., is that your prior testimony, or is that your testimony? [423] Does that indicate that to you? A. It does now, yes, sir.

(Testimony of Elmer Lysfjord.)

Mr. Black: I prefer, Mr. Ackerson, that the witness be asked what it indicates rather than the other way around. I wish to shorten time, but let him do the testifying.

Mr. Ackerson: Very well, Mr. Black.

Q. What do the initials "H. O." at the top of that corner of that document of the Downer Company, Exhibit 19, indicate, Mr. Lysfjord, if you know?

A. It indicates to me that the R. E. Howard Company was to get this job.

Q. Now what does the document show with respect to—well, let me place this.

The document is in evidence, Mr. Black. It shows a figure of 3455 and a figure under it of 467. (Writing on blackboard.)

Now will you refer to the document you have there in front of you from the Howard Company and can you determine from that what the Howard Company bid on that job? A. $3,922.

Q. $3,922? A. Yes.

Q. Now let's go to the next document, which is the Muir Jr. High School Building, Burbank, California.

I again call your attention to the initials in the upper [424] left-hand corner of the Downer document, Exhibit 19. Does that indicate that the Howard Company got that job? A. Yes, sir.

Q. And here is a sheet of paper, Mr. Lysfjord, attached to the Downer document. Can you identify the writing or otherwise on that sheet of paper?

(Testimony of Elmer Lysfjord.)

A. Yes, sir, that is Mr. Arnett's. And, incidentally, on the top of this sheet its says "REH."

Q. Which means what?

A. To me it means R. E. Howard Company.

Q. Now on that sheet of paper we have the figure $39,872. Can you tell me what the Howard document indicates was bid on that Muir job?

A. $39,872.

Q. Now let's turn to the next document. That relates to some portion of a transit shed, Long Beach Harbor, Long Beach, California. Do you have that in the Howard document?

A. Yes. [425]

Q. You have located the document?

A. Yes.

Q. In the upper right-hand corner you again have the initials "H.O." Does that likewise indicate it was a Howard job? A. Yes, sir.

Q. The Downer document indicates a bid by the base bid of $1,205.00?

Mr. Black: Please let the witness say what it indicates.

Mr. Ackerson: Yes.

Q. (By Mr. Ackerson): Do you see on the Downer document the pencil figure there?

A. $1,205.00.

Q. $1,205.00. Does that indicate that, to you, that that was the Howard bid?

The Court: Let's get it in the words of the witness.

Mr. Ackerson: Yes.

The Court: What we are trying to do is to avoid leading questions to the extent that the witness has

(Testimony of Elmer Lysfjord.)

only to yes the attorney. We ought to get the story in the words of the witness.

Mr. Ackerson: Thank you, your Honor.

Q. (By Mr. Ackerson): What does this penciled writing indicate to you, Mr. Lysfjord (indicating)?

A. That was the figure that the R. E. Howard Company [426] was going to bid on this job.

Q. That figure is what?

A. $1,205.00. There is a second figure for an additional amount of work for $17,477.00.

Q. Now, you have the red figures in the circle there on that paper. Do you observe that?

A. Yes, sir.

Q. What do they state, and what is their significance?

A. They state that the figure of $1,205.00 was to be raised 7 per cent, and, incidentally, the 7 per cent is here, too (indicating).

Q. It states 7 per cent? A. Increase, yes.

Q. What is the red figure for the Downer Company? A. $1,289.00.

Q. Turning to the Howard document on the same job, what do you find there as the bid of the Howard Company? A. The initial bid of $1,205.00.

Q. $1,205.00. Is there another bid there?

A. The additional bid of $1,400.00.

Q. $1,400.00. Is there any indication on the Downer bid what they bid on the secondary bid?

A. The secondary bid was $1,477.00, increased by 7 per cent, to $1,580.00.

(Testimony of Elmer Lysfjord.)

Q. We will label this "Downer; Downer; Howard." indicating [427] the first column as the Downer notations of the Howard bid.

The second column is the bid as shown by the Howard files, and the third column is the bid submitted by the Downer Company.

A. Yes, that is correct.

Q. All right. Now, let's go back to these first two, and will you give me the statement for the—the same information with respect to the notations on the addition to the Thompson School, as shown on the Downer document? What was the Downer bid there? A. $3,731.00.

Q. Is there any other notation?

A. And $504.00.

Q. Any reference to a percentage or anything of that sort?

A. No, sir, not on this one.

Q. Let's take the next one relating to the John Muir School. Will you give me the same information with respect to the Downer bid on that job? Is there any indication there as to what the Downer Company did?

A. I am trying to decipher it. It is up here at the top. I can't separate these?

Q. No, you can't.

A. It is forty-four thousand one [428] something.

Q. Forty-four thousand plus?

A. Plus, yes.

Q. Very well. Now, let's take the——

(Testimony of Elmer Lysfjord.)

A. Here is the code figure that is crossed out and moved up to the forty-four thousand.

Q. Indicating what?

A. The $39,872.00 that was mentioned before as being the Howard figure.

Q. That is in the first column?

A. That is right, in Mr. Arnett's handwriting and crossed out and a figure above it raising our figure, the Downer Company figure, to forty-four thousand plus. [429]

Q. This is in the third column, is that right?

A. Yes.

Q. Very well.

Now we are to the third portion of the transit shed, and I believe you testified—will you state and explain the writings on the back of the Downer document?

A. Well, this figure $1,205, the Howard Company's figure, raised seven per cent to $1,289.

Q. Is that the Downer bid? A. Yes, sir.

Q. And is that reflected on the front of the sheet also as the Downer bid?

A. Yes, sir. It says, "We propose to furnish and install Fibreboard walls and aluminum molding as per plans and specifications complete for the sum of $1,289."

Q. That is the third figure here then?

A. Yes, sir.

Q. Is the same thing indicated with respect to the second figure on that sheet, or is there a second figure?

(Testimony of Elmer Lysfjord.)

A. There is a second figure. It says, "If acoustical tile is used in lieu of acoustical plans our bid is $1,580."

Q. That is the third column again?

A. Yes, sir.

Q. Very well.

Now, let's try the next sheet here, which is the gymnasium [430] building, plans on file, Manhattan Beach. Do you find the file in the Howard documents relating to that job? A. What was that?

Q. The gymnasium building, plans on file, Manhattan Beach, Milton Kaufman Construction Company, Arthur Penner. A. I don't see it here.

Q. You do not find it in the Howard Documents?

A. No, sir.

Q. Very well. Let us pass on to the next sheet. The Downer documents indicate intermediate school addition, Culver City. Do you have such a sheet? A. Yes, sir.

Q. Do you find the Howard file on that?

A. Yes, sir.

Q. I call your attention to the Downer file, which is still Exhibit 19, and ask you whether or not you see anything on that exhibit indicating that that was a Howard job?

A. Two things. In the upper right-hand corner it says "HO," or it is written "HO," indicating Howard, and directly below it is the word "Howard" written in full.

Q. Now I call your attention to the back of the

(Testimony of Elmer Lysfjord.)

same document you just referred to, and ask you what the significance of the writing you find on the back that document might be.

A. There is a figure $2,190 indicating Howard's figure. [431]

Q. $2,190? A. Yes, sir.

Q. Very well.

A. And a figure to be quoted by the Downer Company of $2,278.

Q. $2,278? A. That is correct.

Q. Now refer to the Howard documents, that is, Exhibit 29, I believe, and I will ask you if there is anything in there to show what the Howard Company actually did?

A. There is a contract in here between the Simpson Construction Company and the R. E. Howard Company to do the job just mentioned for the sum of $2,190.

Q. Very well.

Now, let's turn to the next sheet, and in the Downer documents, Exhibit 19, it refers to South Bay Cities Courts Building, Redondo Beach. Do you find a document relating to that job in the Howard file? A. Yes.

Q. Now I call your attention to Exhibit 19. Is there anything on the Downer document indicating who performed that job?

A. The upper right-hand corner it is written "How," which to me indicates the Howard Company, and slightly below is the word spelled out, "Howard." [432]

(Testimony of Elmer Lysfjord.)

Q. On the reverse of the sheet do you find certain figures?

A. The figure $889, which is an indication to me of the figure that the R. E. Howard Company was going to bid on this job.

Q. What is the figure again? A. $889.

Q. What, if anything, indicates the Downer bid on that sheet?

A. In red stating, "Quote $978," as the Downer Company bid.

Q. $978? A. That is correct.

Q. Now turn to the Howard file, Exhibit 29. Is there anything there indicating what the Howard Company actually did?

A. Yes, here is a contract between the contractor and the R. E. Howard Company to do the acoustical tile on the job described for $889. [433]

Q. Now, we have the next job here involving acoustical tile, Stevens Junior High School. Do you have such a folder there for the Howard Company, Exhibit 29, which refers to that job?

A. Yes, sir.

Q. Now, I call your attention again to Exhibit 19, referring to the same job. Do you find any indication there that Howard performed that job on the Downer records?

A. In the upper right-hand corner again is the initials "H.O.," indicating to me Howard Company.

Q. On the reverse of that sheet you just referred to, do you find any other figures or any figures?

(Testimony of Elmer Lysfjord.)

A. I see a figure here of $1,584.00; the figure that is to be used by the Howard Company.

Q. That is contained on the Downer records?

A. That is correct. And another figure of $448.00.

Q. $448.00. Is there anything indicated on the Downer records as to what Downer did?

A. Downer quoted for the first figure $1,675.00. For the second figure $675.00.

Q. Now, turn to the Howard documents and see if there is anything that indicates what Howard actually bid.

A. Well, there is a contract for a total amount of work for $2,194.00.

Q. Now, we have another job here in Exhibit 19, multi-purpose [434] building, Longfellow School, Compton. Do you find the document in the Howard file, Exhibit 29, relating to that job?

A. Is that the Longfellow School you mentioned?

Q. Yes, Longfellow School, Compton.

A. Yes, sir.

Q. All right. I call your attention to Exhibit 19 again and to a sheet of that exhibit relating to the Longfellow School. Is there any indication on that sheet, to your knowledge, Mr. Lysfjord, indicating who got that job?

A. Well, in the upper right-hand corner of this sheet of the Downer Company once again it has a number 3 circled. At a later date from the time we have been discussing they changed from using the initial to a number, referring to one or other of the accoustical tile contractors.

(Testimony of Elmer Lysfjord.)

Q. Is there anything on that sheet indicating that that was a Howard job?

A. Written right across the front of the sheet it says, "R. E. Howard."

Q. Turn that sheet over, Mr. Lysfjord, and see if there is any indication there on the Downer record as to what the Howard Company was bidding.

A. The initial figure of $1,878.00.

Q. $1,878.00.

A. That is correct. Another figure of [435] $870.00.

Q. Is there any indication there as to what the Downer Company bid?

A. Yes, sir, it has $1,975.00.

Q. $1,975.00? A. Yes. And $916.00.

Q. Now, turn to the Howard document on that job and tell me, if you can, what the Howard Company bid for that job?

A. There is a contract price between the James M. Dye, Incorporated, and the R. E. Howard Company for the acoustical work for the sum of $1,878.00.

Q. Any other figure on that document? Is there any figure corresponding to the $870.00 on the Downer document?

A. Well, there is another sheet here with a confirmation. In other words, a written acknowledgment of a verbal bid for the additional amount of $870.00.

Q. Well, let's try the next document here. What was that last job, Mr. Lysfjord?

(Testimony of Elmer Lysfjord.)

A. Longfellow School, multi-purpose building.

Q. Do you have any additional files there from the Howard files relating to other jobs, Mr. Lysfjord?

A. I have one here for the teachers' lounge, Culver City High School.

Q. Will you see if you can find a document in the Downer files relating to that job? [436]

A. Yes, sir.

Mr. Doty: Are you referring to Plaintiffs' 20?

Mr. Ackerson: I am referring to Plaintiffs' 19.

Mr. Doty: I don't mean to interrupt. You seemed to be having trouble finding the file. Plaintiffs' Exhibits 19 and 20, you put in and said they referred to Howard at the time.

Mr. Ackerson: Thank you, Mr. Doty, but I am referring to 19 now.

Q. (By Mr. Ackerson): Is there anything on the Downer record, Exhibit 19, indicating whether or not there was a Howard job?

A. Yes, sir, up in the right-hand corner once again there is an "H.O." to me signifying the Howard Company, and directly below it is "Howard" written in full.

Q. On the reverse of that sheet, Mr. Lysfjord, do you find any figures indicating what the Howard bid was on the Downer documents, as contained on the Downer documents? A. $344.00.

Q. Is there anything on that Downer document, Exhibit 19, relating to this particular school, that states what the Downer bid was?

(Testimony of Elmer Lysfjord.)

A. Downer bid of $358.00. [437]

Q. Now will you turn to the Howard records, Exhibit 29, and see what the Howard Company actually did if the record shows that?

A. $438.

Q. $438?

A. Oh, there is an additional sum there. They did an extra amount of work. The original sum was $344 and an added sum of money for an extra of $94, making it $438.

Q. The original bid was $344 or $444?

A. $344.

Q. Now are there any other records in the Howard file, Exhibit 29, relating to other jobs? Do you have one for the Sutter Junior High School, Los Angeles Board of Education, etc.?

A. Yes, sir.

Q. Now, I refer your attention again to Exhibit 19. Do you find a sheet there relating to the same job, the Sutter school? A. Yes, sir.

Q. And is there anything on that Exhibit 19, the Downer record, which would indicate what the Howard Company bid?

A. In the upper right-hand corner the initial "H" indicating to me Howard.

Q. And on the reverse side of the sheet which you just referred to, is there any indication what the Howard [438] Company bid on that job?

A. $417 and $147.

Q. And is there any indication what the Downer Company bid on the same job?

(Testimony of Elmer Lysfjord.)

A. $458 and a figure of $165.

Q. Now turn to the Howard folder, Exhibit 29, and see if you can tell us what the Howard Company actually bid?

A. There is a confirmation by the Howard Company to the Hudson Construction Company for the Sutter Junior High School for a total of $564.

Q. Now does that complete the folder you have for the Howard Company? A. Yes, sir.

Mr. Ackerson: I will offer Plaintiffs' Exhibit for Identification—I believe it is 20; I don't see the marking on there—Plaintiffs' Exhibit 20 for Identification in evidence.

The Court: Received.

The Clerk: I can't tell what it is. No. 20 is an estimate sheet.

Mr. Ackerson: These are additional documents to the previous exhibit.

Mr. Doty: Then they are still part of Plaintiffs' Exhibit 29, I take it?

Mr. Ackerson: Yes, we will make them part of Exhibit [439] 29.

Q. I show you some additional documents of the Howard Company, Mr. Lysfjord, and I ask you if you find a folder there relating to the Carver School addition, Willowbrook? A. Yes, sir.

Q. And I show you Plaintiffs' Exhibit 20 and ask you if you find a document there relating to the same job? A. Yes, sir.

Q. Exhibit 20 you recognize as the Downer records? A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. Is there anything on the Downer records, Exhibit 20, that indicates who got that job?

A. There is an "HO" on the upper right-hand corner, indicating the Howard Company.

Q. And on the reverse side of the sheet are there any figures, on the Downer records, what the Howard Company bid?

A. Yes, sir. The first figure of $4,233, $809, and $1,995.

Q. And does that document, Plaintiffs' Exhibit 20, indicate what the Downer Company bid?

A. Yes, sir. $4,529, $866 and $2,135.

Q. Now if you can, turn to the Howard Company documents and see if you can determine what the Howard Company actually bid?

A. The first figure of $4,233, the second figure of [440] $809, and the third figure of $1,995.

Q. Now do you have a Howard folder there relatting to the kindergarten addition, Savannah School, Rosemead? A. Yes, sir.

Q. I again call your attention to Plaintiffs' Exhibit 20 and ask you if the Downer documents contain a record or a reference to that school job?

A. Yes, sir.

Q. And does the Downer document indicate who got the job?

A. In the upper right-hand corner are the initials "HO."

Q. Which indicates the same Howard Company? A. Yes.

Q. Now, on the reverse side of this Savannah

(Testimony of Elmer Lysfjord.)

School, do you find any indication on the Downer records what the Howard Company was bidding?

A. Yes, sir, the sum of $434. [441]

Q. Has the same document, Exhibit 20 of the Downer Company, or, does it indicate what the Downer Company bid?

A. Downer Company bid $481.00.

Q. Now, turn to the Howard documents and tell me, if you can, what the Howard Company actually bid?

A. The Howard Company actually bid $434.00.

Q. Now, we have one other job here, the City Hall Bell, City Council Bell—City Hall Bell, I think, is the title of the job.

Do you have a folder covering that job from the Howard files? A. No, sir.

Q. Do you have a folder covering the Five-Shop Building, Compton, in the Howard files?

A. No. I have one here saying "Compton Junior High." There might be——

Q. This is Compton Junior High? See if you have one for Five-Shop Building, Compton Junior College, Compton, the contractor being W. C. Smith, I believe, or Morley Building Company.

A. This is with the Morely Building Company. I may find further papers here to state that it is the——

Q. Did you have a paper there, Mr. Lysfjord, that would indicate the amount that Howard bid on the job you are referring to? [442]

(Testimony of Elmer Lysfjord.)

A. Yes, sir.

Q. What did they bid? A. $4,652.00.

Q. Now, I call your attention to, I think this is part of Exhibit 20. It is the remaining sheets.

Mr. Ackerson: Mr. Black, do you have any objection to stapling it on Exhibit 20, rather than making it a separate exhibit?

Mr. Black: None whatever.

Q. (By Mr. Ackerson): The last page then, Mr. Lysfjord, of Plaintiffs' Exhibit 20, the Downer document I am handing you, is there anything on that page that indicates who got that job?

A. In the upper right-hand corner of this paper there is spelled out the word "Howard."

Q. Will you reverse the page that you are just looking at and tell me what you see on the reverse side of the page, with respect to bidding figures?

A. It has the "R. E. Howard" figure of $4,652.00.

Q. $4,652.00. And what, if anything, does the paper show with respect to the Downer bid?

A. There is a note stating, "Add 4 per cent, $4,838.00."

Q. Now, turn to the Howard documents and tell me, if you can, what the Howard Company did, in fact, bid.

A. The contract calls for a figure of $4,652.00. [443]

Mr. Ackerson: Mr. Clerk, it has been stipulated this may be deemed part of 29 (indicating).

You may staple this last page on Exhibit 20.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, these are the same documents with respect to the Shugart Company and the same stipulation——

Mr. Ackerson: Is that correct, Mr. Black?

Mr. Black: Yes; same reservation.

Mr. Ackerson: Same reservation. This is Exhibit 33 for Identification. We offer it in evidence under the reservation and stipulation mentioned in connection with the prior exhibit.

(The document heretofore marked Plaintiffs' Exhibit 33 was received in evidence.)

Q. (By Mr. Ackerson): Now, Mr. Lysfjord, I have handed you Plaintiffs' Exhibit 33 consisting of certain documents. Will you tell us what those documents purport to be?

A. The job files of certain acoustical installations of The Harold E. Shugart Company.

Q. Now, do you have a record there relating to the Puente High School addition, Puente?

A. Yes, sir.

Q. I call your attention to Plaintiffs' Exhibit 21, consisting of the Downer records. Do you find a job, the same job mentioned on Plaintiffs' Exhibit 21? [444] A. Yes, sir.

Q. Is there anything on the Downer records, that is, Exhibit 21, which indicates what company performed that job?

A. In the upper right-hand corner are the initials "SH," indicating to me Shugart Company.

Q. Now, turn the page on that particular sheet

(Testimony of Elmer Lysfjord.)

you are referring to. Is there anything else on the reverse side of the document which would indicate what the Howard Company bid on that job?

Mr. Black: Shugart Company?

Mr. Ackerson: The Shugart Company. Beg your pardon. Thank you.

The Witness: Yes, sir, a figure of $4,822.00.[445]

Q. (By Mr. Ackerson): $4,822?

A. And another figure as a second bid for additional work of $6,303.

Q. Is there anything on that document there, Exhibit 22, indicating what the Downer Company did?

A. Yes, there is a note to increase the Shugart figure by 7 per cent, making the figure $5,160.

Q. $5,160?

A. And an additional note of increasing the second figure by 7 per cent, making the figure $6,741.

Q. Now turn to the Howard documents——

Mr. Black: Shugart.

Q. (By Mr. Ackerson): ——the Shugart document—excuse me—relating to the same job, and tell me if you can what the Shugart Company actually did on the job?

A. There is a contract price for $6,303.

Q. Is there any mention about the other figure of $4,822?

A. Yes, there is a confirmation sent to the general contractor for the bid No. 1 of $4,822.

Q. See if you can find a folder in the Shugart

(Testimony of Elmer Lysfjord.)

file, Mr. Lysfjord, relating to the addition to the Roosevelt School, Bellflower.

A. I don't seem to. [446]

Q. Well, that is not——

A. Oh, yes. I beg your pardon. I found it.

Q. Now I call your attention to Plaintiffs' Exhibit 21, and ask you if you find the same job mentioned on that document? A. Yes, sir.

Q. Is there any notation on the Downer document, Exhibit 1, as to who got that job?

A. In the upper right-hand corner the indication Shugart by the three initials, or the three letters, "Shu."

Q. Turn the page over and tell me, if you can, from the document what, if any, figures are shown there indicating the bid of the Shugart Company on the Downer document?

A. A figure of $4,172, and an additional figure of $447, and another figure of $1,284.

Q. Is there any indication as to what the Downer Company bid on the same job?

A. Yes, sir, a figure of $4,487, a figure of $489, a figure of $1,161.

Incidentally, I might add that that third figure is under the classification of a deduct.

Q. What does that mean? Does it so state on the document? A. Yes, sir, it says "Deduct."

Q. What does that mean, if you know, Mr. Lysfjord? [447]

A. Well, in bidding a job the specifications and plans will call for a certain piece of work to be

(Testimony of Elmer Lysfjord.)

completed. They sometimes ask in addition to that, if a building or a series of classrooms or a portion of a building were to not to be built at this time, they ask for an amount of money to be deducted from the original bid if the principals or owners decided not to do this work at that time.

Q. So that on the Downer bid this $1,161—is that a deduct?

A. Yes, sir, that is a deduct from the figures above.

Q. In the event a portion of the building was not built? A. That is correct.

Q. Is there any special significance to the $1,284 figure relating to the Shugart bid?

A. Well, to me it indicates that the deduct is less on the Downer figure than it is on the Shugart figure.

Q. Is this $1,284 figure on the Downer document relating to the Shugart bid also a deduct?

A. Yes, sir.

Q. In other words, that is the same figure as the $1,161, I mean the same type of figure?

A. They are both indicated as deducts.

Q. I am going to put a star here to indicate deducts.

Now, turn to the Howard documents, if you will, relating to that same job and will you tell me, if you can, what Howard [448] actually bid on the job?

Mr. Doty: Shugart.

Mr. Ackerson: Shugart. I am sorry.

(Testimony of Elmer Lysfjord.)

The Witness: The original figure of $4,172, the second figure of $47, and a deduct of $1,284.

Q. (By Mr. Ackerson): Now that was the Daniel Webster School, was it? Do you have a folder for the Daniel Webster School in the Shugart file? It is new school plant, Daniel Webster School, Long Beach?

A. I don't seem to see that one.

Q. How about the Lakeside School, Santa Fe Springs? A. No, sir.

Q. On Plaintiffs' Exhibit 21 I note that on the Lakeside School, Santa Fe Springs, there are some notations. Can you from those notations tell who that job went to?

A. Well, I see the initials, or the letters "Sh" crossed out and the initial "S" placed in there. To me that indicates the Sound Control Company. [449]

Q. Sound Control got the job?

A. Yes, sir.

Q. Now, let's see about this remaining job here. Flora Drive School, Whittier. Do you have that?

A. I don't seem to have that one here, no, sir.

Q. I show you Plaintiffs' Exhibit 21 again and ask you if you can tell me from that, from the Downer documents, who purportedly got that job?

A. The initials "S.H." in the upper right-hand corner, a circle around the initial "D," and an "O.K." written before it.

Q. What does that indicate? What does it mean?

A. It indicates there was some change in their plans at the very last moment and Shugart was not

(Testimony of Elmer Lysfjord.)

to get the job, but that the Downer Company was.

Q. And you find no records in the Shugart files submitted yesterday indicating that the Shugart Company actually got the job? A. No, sir.

Q. Now, will you see if you have a folder for the Hawthorne School, Beverly Hills? A. No, sir.

Q. Do you have a folder in the Shugart file for the Academy Building, San Fernando?

A. No, sir. [450]

Q. Do you have a folder for the Franklin School building, Burbank? A. Yes, sir.

Q. Do you find a Downer record relating to the same job in Plaintiffs' Exhibit 24, which I show you? A. Yes, sir.

Q. Does the Downer record indicate who got the job?

A. This time there are no initials in the upper right-hand corner. However, the name "Shugart" is spelled out.

Q. Is there any place in that record, Plaintiffs' Exhibit 24, the Downer records, indicating what the Shugart Company did on the job?

A. On the reverse side the figure of $1,763.00.

Q. Does the same record indicate what the Downer Company bid?

A. Yes, sir, $1,940.00.

Q. Any other notations with respect to the Downer bid?

A. Only that it is signed by "R.W.A."

Q. Meaning whom? A. Mr. Arnett.

Q. See if you can determine what the Shugart

(Testimony of Elmer Lysfjord.)

Company bid actually on that job from the Shugart records?

A. The contract price of $1,763.00.

Q. Do you have a folder there referring to a job known [451] as Addition to Gymnasium and Cafeteria, Mira Costa High School? I am referring to the Shugart file. A. No, sir.

Q. Do you have one referring to the Corona Avenue School assembly hall? A. Yes, sir.

Q. Do you find a similar document in Plaintiffs' Exhibit 24 here, the Downer record, referring to the same job? A. Yes, sir.

Q. Does the Downer record disclose who was to get the job?

A. The upper right-hand corner, the lettering "S-h-u-g" indicating to me Shugart Company.

Q. What, if anything, does the Downer records say regarding the Shugart bid? A. $912.00.

Q. What did the Downer Company bid?

A. $984.00.

Q. Now, can you tell me what was actually bid by the Shugart Company from their own files, from the Shugart file? A. $797.00.

Q. Any additions, or is that the total bid?

A. Well, I was looking at a billing at that particular [452] time.

Q. That apparently is the bid, so far as you can determine?

A. That seems to be, from what I can see.

Mr. Ackerson: Very well. Now, I am going to attempt to shorten this by referring to isolated ex-

(Testimony of Elmer Lysfjord.)

amples, in regard to the rest of these companies, Your Honor, with Mr. Black's permission.

You may bring in any additional examples you wish, to check the accuracy, Mr. Black.

Mr. Black: Thank you, Mr. Ackerson.

Mr. Ackerson: I will offer this Plaintiffs' Exhibit 34 relating to the Reeder Company, Mr. Black, under the same stipulation.

Mr. Black: Same stipulation and same reservation.

The Court: Received.

(The document heretofore marked Plaintiffs' Exhibit No. 34 was received in evidence.)

Q. (By Mr. Ackerson): Mr. Lysfjord, I am handing you Plaintiffs' Exhibit 34 and ask you if you can describe that document, those documents?

A. It is a job folder for L. D. Reeder Company. [453]

Q. Do you have a folder there for the Rancho Santa Gertrude School? A. Yes, sir.

Q. And do you see, referring to Plaintiffs' Exhibit 26, a similar reference to that school in the Downer file, in the Downer exhibit?

A. Yes, sir.

Q. What, if anything, is there on the Downer exhibit that indicates who got the job?

A. Just the No. 6. And further down on the page the word, or the name, "L. D. Reeder Company."

Q. Do you note any figures, similar figures, that

(Testimony of Elmer Lysfjord.)

we have been discussing on the back of that page of the Downer Company document?

A. Yes, sir. I see a figure of $2,400. However, it is scratched out and a figure above it of $2215 inserted.

Q. What is the significance of that, if you know?

A. Well, the original figure given to the Downer Company for the bid of the Reeder Company was to be $2400, and for some reason the Reeder Company changed their figure to $2215.

Q. $2215 you say is the figure that was actually settled upon, the last figure? A. Yes, sir.

Q. Does the sheet indicate what the Downer Company [454] bid? A. $2520.

Q. Now turn to the Reeder documents and tell me, if you can, what the Reeder Company actually bid?

A. I find a notation on the Reeder Company's stationery for acoustical tile ceiling for the price of $2215.

Q. Now, Mr. Lysfjord, do you have a folder in the Reeder Company for the temporary facilities, Long Beach State College? A. No, sir.

Q. Do you have any other folder there?

A. No, that is the only folder.

Q. Thank you.

I marked this folder and I am offering 31, Mr. Black, under the same stipulation and restrictions.

The Court: Received.

(The document referred to was received in

(Testimony of Elmer Lysfjord.)

evidence and marked Plaintiffs' Exhibit No. 31.)

Q. (By Mr. Ackerson): I am handing you a folder of documents marked Plaintiffs' Exhibit 31, Mr. Lysfjord, and I will ask you to examine those. Are they similar job files as to those you have been describing? A. Yes, sir.

Q. Do you have a folder there covering the Willowbrook [455] School? A. No, sir.

Q. Do you have a folder there covering the district administration office, warehouse building, Whittier? A. No, sir.

Q. Do you have a folder there covering Veterans Memorial Park, Welfare Building?

A. No, sir.

Q. Do you have a folder there for Sound Control Company? A. Yes, sir.

Q. Do you have a folder there covering the alterations and additions to the Roosevelt High School?

A. Yes, sir.

Q. Will you turn to that folder, please, and I call your attention again to Plaintiffs' Exhibit 22 and ask you if you find a document from the Downer Company in that exhibit relating to the same job? A. Yes, sir.

Q. Is there any indication on the Downer document whether or not Sound Control got the job?

A. In the upper right-hand corner the letters "SO," and a little further down on the page the words "Sound Control."

(Testimony of Elmer Lysfjord.)

Q. Now I want to ask you the same questions with respect [456] to the reverse side of that sheet you just referred to. Is there any indication on the Downer document as to what the Sound Control bid was? A. Yes, sir; $4802.

Q. What did the Downer Company bid?

A. $5186.

Q. Now turn to the Sound Control file you just mentioned—I believe it is Plaintiffs' Exhibit 34—and tell me if you can, what Sound Control actually bid?

A. Here is a computation sheet with a series of amounts of different types of insulation adding up to the total of $4802.

Q. Now, Mr. Lysfjord, you have gone through similar documents from the Downer Company as they relate to Acoustics, Inc.? A. Yes, sir.

Q. I mean, you have gone through the same procedure, have you? A. Yes, sir.

Q. Is there any substantial difference in the documents supplied by Acoustics, Inc.—and I am referring to Plaintiffs' Exhibit 35, which I hand you—you have examined those documents, have you?

A. Yes, sir.

Q. And you have examined them in connection with [457] Plaintiffs' Exhibit 23, the Downer Company records? A. Yes, sir.

Q. Do you find the same or substantially the same relationship between the two documents, that is, the notations on the Downer documents and the

(Testimony of Elmer Lysfjord.)

bid prices on the Acoustics, Inc., documents, or are they substantially different?

A. They are identical.

Q. In other words, they work out the same way as we have illustrated on the board with respect to Shugart and Coast? A. Yes, sir.

Mr. Ackerson: I don't believe I have offered this Plaintiffs' Exhibit 35. I will do so with the same understanding.

Mr. Black: Same reservation.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 35.)

Q. (By Mr. Ackerson): Mr. Lysfjord, I am showing you Plaintiffs' Exhibit 32, which purports to be the documents of Coast Insulating Products, that is, the job files, certain job files of Coast Insulating Products, and I ask you if you have examined those documents in connection with the Downer document, Plaintiffs' [458] Exhibit No. 25?

A. No, sir, I didn't see that one.

Q. That one you haven't examined?

A. No, sir.

Mr. Ackerson: Will you bear with me just a moment?

Q. Have you reviewed the Denton files?

A. No, sir. You asked me so far the files that I have seen. The others I have not had an opportunity to check.

Mr. Ackerson: I see. I did not understand that.

(Testimony of Elmer Lysfjord.)

I thought you worked later last night, Mr. Lysfjord. I thought you had examined them all. That is the cause of my confusion.

Is your Honor's stopping time 4:30 or 4:45 tonight?

The Court: I thought I would gauge it by the fact that we were late getting started and would work on until 4:40. If it places you in a difficult position, why we will adjourn now. These cases are inherently tedious.

Mr. Ackerson: Yes, they are, and I would like to break off. I think I can finish these others—I won't go into them—I will just ask the general question, but I want him to look at them in order to not have to go into them, and then I will change the subject matter. So if you find it convenient or possible I would like to have an adjournment now.

The Court: We are pressed with a great deal of business in this department, but we can take the adjournment from now [459] until tomorrow morning. Let us try to start at 1:45 tomorrow. The jury are excused until that time.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 1:45 o'clock p.m., Wednesday, May 11, 1955.) [460]

May 11, 1955—1:45 P.M.

The Court: The litigants being represented, you may proceed.

Mr. Ackerman: Thank you, Your Honor.

Mr. Black: If the Court please, and Mr. Ackerson, there was a minor correction I would like to make in connection with the transcript. Do you have page 366, line 4, Mr. Ackerson, available?

Mr. Ackerson: From Volume 4, Mr. Black?

Mr. Black: In Volume 3.

Mr. Ackerson: Page 366——

Mr. Black: Line 4. It is in connection with the matter of the telephone and our stipulation that is shown on page 55 of the transcript, lines 4 to 5, I apparently misspoke myself and I am sure the record bears me out, Mr. Ackerson, that the only thing we know from the telephone company is the date the deposit on that telephone was made, which was January 4th.

We have stipulated that the installation must have been sometime after that date, presumably very shortly thereafter, but not necessarily on that date. I think that is——

Mr. Ackerson: If you make the statement, Mr. Black, that is satisfactory. Let the record be so corrected.

Mr. Black: That is our original stipulation. [462]

The Court: This is a correction of a statement made, rather than a correction of a stenographic error?

Mr. Ackerson: Yes.

Mr. Black: Yes.

Mr. Ackerson: If Mr. Black makes the statement, I am quite sure we will accede to it.

The Court: On page 354, in the same volume, in line 1, "Do you want the answer to the law part

of the question—" I think the word was the "last part" instead of the "law part."

Mr. Ackerson: I think that is correct.

The Court: Then at line 3 the word would be "last"——

Mr. Black: I understood the word to be "long." Could it have been that?

Mr. Ackerson: I know it was either "long" or "last," but it wasn't "law." So we can make it either one.

Mr. Black: Make it either one.

The Court: Let's make it "last."

Mr. Black: All right.

The Court: Also on page 374, the last line, I believe the word "that" should be "they," t-h-e-y.

Mr. Black: That probably is true.

Mr. Ackerson: Yes.

The Court: There being no objection, the transcript is deemed amended by this colloquy.

Mr. Ackerson: No objection, Your Honor. If the Court [463] please, Mr. Black has consented I might call a witness out of order for the purpose of convenience.

Is that satisfactory with the Court?

The Court: Certainly. [464]

Mr. Ackerson: I will call Mr. Hamiel.

FRANK W. HAMIEL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Frank W. Hamiel.

The Clerk: How do you spell your last name?

The Witness: H-a-m-i-e-l.

Mr. Ackerson: May I ask that this exhibit be marked Plaintiffs' Exhibit for Identification next in order?

The Clerk: Plaintiffs' Exhibit 38.

(The document referred to was marked Plaintiffs' Exhibit No. 38 for Identification.)

Mr. Ackerson: And may I ask that this next exhibit be marked likewise as Plaintiffs' Exhibit next in order?

The Clerk: Plaintiffs' Exhibit 39 for Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 39 for Identification.)

Direct Examination

By Mr. Ackerson:

Q. Mr. Hamiel, I show you——

Mr. Black: Pardon me. In order that I may understand what we are talking about, may I see them?

Mr. Ackerson: Yes. I am sorry. I have exhibited these to you before, Mr. Black. [465]

(Testimony of Frank W. Hamiel.)

Mr. Black: I know you have, but I didn't remember what they were.

(Exhibiting exhibits to counsel.)

Q. (By Mr. Ackerson): Mr. Hamiel, I show you Plaintiffs' Exhibit 38 for Identification and ask you if you can identify that exhibit?

A. Yes, sir. This was prepared by Mr. Waldron and myself.

Mr. Black: Mr. Hamiel, I can't hear you at this range.

The Witness: This was prepared by Mr. Waldron and myself.

Q. (By Mr. Ackerson): And will you state what the exhibit purports to be?

A. This exhibit purports to state the amount of damages incurred by Mr. Waldron.

Q. As a partner of aabeta company?

A. As a partner of the aabeta company.

Q. Does that purport to state the damage alleged to have been suffered by him separately as from Mr. Lysfjord? A. Yes, sir.

Q. Now I show you Plaintiffs' Exhibit 39 for Identification, and I wonder if you would tell us what that document is?

A. This is the damages incurred or purported to be incurred by Mr. Lysfjord.

Q. Now in connection with Exhibit No. 39 for Identification, [466] will you state briefly how that exhibit was prepared?

A. Well, Mr. Lysfjord was employed previously

(Testimony of Frank W. Hamiel.)

and had a normal wage that he made or commissions that he earned with this company, and that he normally expected to at least make as much money in his own partnership.

Q. As a basis for the preparation of this document, Mr. Hamiel, did you and Mr. Lysfjord examine documents purporting to substantiate his past earnings?

A. Yes, we took his income tax which he had filed and took the amount of money that he had earned off of them.

Mr. Ackerson: And those income tax returns have been submitted to you, Mr. Black, have they not?

Mr. Black: They have. That is, for Mr. Lysfjord only.

Mr. Ackerson: I am talking about Mr. Lysfjord.

Mr. Black: And only for 1951 and '52.

Mr. Ackerson: Yes.

Q. And you used the 1951-'52 income tax returns of Mr. Lysfjord in the preparation of this document?

A. Yes, sir, his earnings from the Downer Company, R. W. Downer Company.

Q. Now did you utilize any other documents in connection with the preparation of that document?

A. I had prepared a cost of tile that was actually paid through the aabeta company's books.

Q. And let me show you a bundle of documents here. [467]

I hesitate to mark anything like this in evidence,

(Testimony of Frank W. Hamiel.)

Your Honor. This is just a foundational witness.

Mr. Black, I wonder if I can have him identify these with the understanding that they may be kept in Court for any use you may wish to make of them without making them an exhibit for identification.

Mr. Black: I don't suppose there is any objection to making them an exhibit for identification. You don't have to offer them.

Mr. Ackerson: Very well. I will ask that they be marked Plaintiffs' Exhibit for Identification next in order as one exhibit.

The Clerk: That will be Plaintiffs' Exhibit 40 for Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 40 for Identification.) [468]

Mr. Ackerson: I will get an envelope to put those in later.

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 40 for Identification, and ask you if you can identify that series of documents?

A. These were invoices which were paid through the aabeta co. books for material for acoustical tile.

Q. In other words, they are all acoustical tile invoices? A. That is right.

Q. Covering what period of time?

A. Covering from the inception of the business to the present date.

Q. Do you know whether or not they included the original carload of acoustical tile purchased

(Testimony of Frank W. Hamiel.)

from The Flintkote Company? A. No, sir.

Q. That was purchased on——

The Court: Let's see. Are you saying you don't know or are you telling they do not?

The Witness: They do not include it.

Mr. Ackerson: Oh, I am sorry. I misunderstood the answer, Your Honor.

Q. (By Mr. Ackerson): They do not include it? A. No, sir. [469]

Q. In other words, this is acoustical tile purchased by aabeta co. subsequent to the first order they received from Flintkote?

A. That is right.

Q. These documents, Plaintiffs' Exhibit 38 for Identification and Exhibit 39 for Identification, accurately reflect the cost of the tile concerned in Plaintiffs' Exhibit for Identification last marked?

A. That is right.

Q. That is the figure—can you point out where that is reflected in each of those exhibits, Plaintiffs' Exhibit 38 and Exhibit 39 for Identification?

A. Actual cost of tile purchased was $87,808.97.

Q. The same figure is reflected on both statements? A. Both exhibits, yes.

Q. Then what do the Exhibits 38 and 39 for Identification reflect with respect to that tile?

A. They reflect that that amount was paid and we have based an average cost based on the Pioneer-Flintkote's actual cost on the carload of tile, to arrive at an overpayment or an excessive cost of material.

(Testimony of Frank W. Hamiel.)

Q. You mean in excess above what Flintkote would have charged?

A. Would have charged them, yes.

Q. How did you arrive at that cost through this exhibit [470] for identification last marked?

A. We took the cost of the material, that is, the cost per square foot of the material.

Q. From whom?

A. From this Exhibit 40, purchased from the lot of various people.

Q. Yes.

A. And we got a price per foot on it, per average foot, and it came up 17 per cent higher than it would have cost if it had been purchased from the Flintkote people.

Q. Did you state, or, can you state to the Court and jury 17 per cent additional cost, that is, above the Flintkote price, is a minimum or is it an average or would you say it might be more or less than 17 per cent? A. It was an average.

Q. Can you state whether or not that would be the actual figure considering all of the invoices in Exhibit 40 for Identification?

A. It would have been the case if the tile had remained at the same cost we were using for a basis.

Q. What cost did you use?

A. 10.5 cents per square foot for the ½-inch tile.

Q. 10.5 you used? A. Yes.

Q. 10 cents and a half? [471]

A. I think that was it, yes, sir.

Q. For the cost of the Flintkote tile?

(Testimony of Frank W. Hamiel.)

A. Yes.

Q. From that base figure you figured that the cost of all the tile purchased through these invoices in Exhibit 40 for Identification was 17 per cent higher than that? A. That is right.

Q. Now, did you assist in preparing the other figures relating to other assets or the other figures on these exhibits? A. Yes, I did.

Q. That is, 38 and 39 for identification?

A. Yes, sir.

Q. Were they done under your supervision?

A. Yes, sir.

Q. Did you inspect the work later?

A. That is right.

Q. Do you approve the figures, the computations? A. That is right.

Q. Mr. Hamiel, what is your occupation?

A. I am a public accountant.

Q. How long have you been a public accountant?

A. Ten years.

Q. Is that your sole occupation?

A. That is right. [472]

Q. Do you practice that profession generally?

A. Yes, sir.

Q. It isn't restricted to acoustical tile?

A. No, sir.

Mr. Ackerson: Will you require any further foundation from this witness, as to these two exhibits, Mr. Black?

Mr. Black: That is the only testimony you are going to elicit from Mr. Hamiel?

(Testimony of Frank W. Hamiel.)

Mr. Ackerson: I am going to a slightly different subject, while he is on the stand. It will be very brief.

Mr. Black: I want to interpose an objection to these documents if your purpose is to offer them now.

Mr. Ackerson: No.

Mr. Black: Not on the ground no foundation has been laid, necessarily; reserving that, among other things. But I would like to know what he used, what books he used, if any, in coming to these figures, if you are going to——

The Court: It occurs to me that the witness has stated that the documents reflect damage sustained, but how does he know what damage was sustained?

The documents might reflect losses incurred in certain operations, because of being prevented from performing certain operations: But for him to state that in terms of damages is a legal conclusion.

Mr. Ackerson: Well, I think Your Honor is right, excepting [473] only insofar as the mechanical facts contained in Exhibit 40 for Identification are concerned.

The documents do contain other elements of damage, which I think are based upon knowledge within the sphere of the two plaintiffs. But I wanted to clear the first part of the exhibits, which relate only to excess prices.

The Court: Having heard this testimony, but not having seen the exhibits which are thus far for identification only, I can't tell whether he is includ-

(Testimony of Frank W. Hamiel.)

ing items which would be properly chargeable upon the plaintiffs' theory of the case or whether he is including items which would not be so chargeable, or just what the items are. I think foundation should be such that the jury can tell and the Court can tell what the conclusions are based upon. [474]

Mr. Ackerson: I think perhaps you are right, Your Honor. Maybe I can go over them item by item and let's get the foundation, Mr. Hamiel. That is the basis for your computations here.

Q. We will refer to Exhibit 38 for Identification first. You have an item here, "Actual Cost of Tile Purchased, $87,808.97." That refers to tile purchased during what period?

A. Since the inception of the company until the present date.

Q. Excluding the original carload of Flintkote tile? A. Yes, sir.

The Court: By "present date," do you mean today?

The Witness: The date of this operation which was about a week ago, May 3rd.

Q. (By Mr. Ackerson): Where did you get that information?

A. That was taken from the aabeta company's files.

Q. And by files, do you refer to Exhibit 40 for Identification? A. That is right.

Q. In other words, that is a tally or a total of all the invoices for acoustical tile in the aabeta company's files?

(Testimony of Frank W. Hamiel.)

A. That is right, other than Flintkote. [475]

Q. And you added those up and that came to a total of $87,808.97? A. Right.

Q. Then you have another item under that, "Estimated Cost from Distributor based upon 17 per cent overpayment for tile." Upon what basis did you arrive at that figure, and the figure is $66,503.40?

A. Each of these invoices listed a unit price per foot, per square foot, and the tally was made of the unit price per square foot, and it was divided to get an average cost per square foot.

Q. And you found that the average cost per square foot on that basis——

A. Was 17 per cent higher than the other charges.

Q. And the other charge, by that what do you mean?

A. The charge that they paid for their carload of material.

Q. From Flintkote? A. Yes, sir.

Q. And what did you find was the price charged by Flintkote for that carload they bought from them? A. Well, as I remember it, it was 10.5.

Q. It could have been 10 cents or it could have been 10.5? A. Yes. [476]

Q. But in any event you used that, you deducted the price charged directly by Flintkote, you deducted that from the price actually paid through these invoices in Exhibit 40 for Identification?

A. The average price actually paid.

(Testimony of Frank W. Hamiel.)

Q. And you arrived at what figure?

A. At a 17 per cent markup.

Q. Can you point out the figure representing that 17 per cent markup?

A. The $87,808.97, that is, the actual cost of the tile that was purchased from other vendors——

Q. Yes.

A. ——if that represents a total of 117 per cent of the actual cost that would have been paid if they had bought the tile from Flintkote——

Q. Yes.

A. ——this second number here then would be the actual cost of the tile if it had been purchased from The Flintkote Company.

Q. And that is based on the price actually paid by aabeta company to The Flintkote Company?

A. That is based on this number here representing 117 per cent of the cost of the material if it had been purchased from Flintkote.

Q. How did you find out the price that would have been [477] charged by Flintkote? How did you arrive at that figure?

A. We knew what the price charged by Flintkote was.

Q. That was supplied to you by the aabeta company?

A. That was supplied by the aabeta company, that is right.

Q. And that figure is $66,503.40. Then you deducted one from the other? A. That is right.

Q. And you arrived at what figure?

(Testimony of Frank W. Hamiel.)

A. $21,305.57.

Q. Which denotes what?

A. Denotes the excess of moneys paid for acoustical tile to these vendors listed in this exhibit rather than——

Q. Pardon me. By "this exhibit" you are referring to Exhibit for Identification No. 40?

A. Yes, sir—rather than if the tile had been purchased directly from The Flintkote Company.

Q. Then what did you do on this exhibit?

A. I charged one-half, or took one-half of that number as being the share that would be applicable to Walter Waldron.

Q. You state "that number"; you are referring to the figure $21,305.57? A. That is right.

Q. And you allocated one-half of that number to Mr. Waldron? [478] A. That is right.

Q. And that number is what?

A. That number is the share chargeable to him.

Q. Which is—— A. $10,652.78. [479]

Q. Now is that the same method you used in arriving at the figures on Exhibit 39 excepting only that that applies to Mr. Lysfjord, is that right?

A. That is right.

Q. And the figures are the same in those respects? A. That is right.

Q. Now did you have anything to do with the figures on the top of the page? A. Yes, sir.

Q. In other words, you have an item here, "Commissions and expected profits, seven months, at

(Testimony of Frank W. Hamiel.)

$3160 per month, equals $22,120." What does that figure mean, if you know?

A. One-half of that number would represent the commissions that Mr. Lysfjord, had he continued to operate on the same rate of commissions that he had when he worked for the Downer Company, with no increase or decrease in his sales.

Q. Yes?

A. It is predicated upon a markup common to the acoustical business, I think, of one-third profit, gross profit——

Q. Yes?

A. ——Mr. Lysfjord at the time he worked for the Downer Company received approximately 10 per cent of the sales price of the contract as his commission. 10 per cent approximately would be allocated to the profit for the Downer Company, and 10 per cent would be allocated for the overhead incurred by [480] the Downer Company.

Q. Yes?

A. Mr. Lysfjord in his own company would normally expect to not only earn his commissions as selling the job, but he would also expect to earn the 10 per cent for the profit since he owned half the company. That is what this number, $3160, is compounded upon.

Q. That $3160 per month, then, consists, as I understand it, or is based rather, upon the 10 per cent commission for sales? A. Yes.

Q. And the 10 per cent expected normal profit on a job? A. That is right.

(Testimony of Frank W. Hamiel.)

Q. The other 10 per cent being overhead?

A. That is right.

Q. Which is not considered in this $22,120?

A. No, sir.

Q. Now, if you know, or if you participated in this part of the exhibit, you have an item, the second item from the top of the page, "San Bernardino expense, $960." Do you know how that was arrived at and can you tell us?

A. When the company was started up they had an office in San Bernardino, I think primarily at the request of The Flintkote Company. [481]

Q. You were informed they had an office in San Bernardino?

A. That is right. That office cost them $1920, and one-half of that was chargeable to Mr. Lysfjord.

Q. Were you informed that the office itself cost $1900 or does that purport to be the total San Bernardino expense? Will you examine that and tell me that, if you can?

A. They had a rental of $60 a month for a year, and they had utilities and trucking and commissions expense of $500 and $700 respectively in order to operate that business. [482]

Q. So that that total constitutes the sum of $960.00 on the Lysfjord exhibit?

A. That is right.

Q. Now, do you represent the aabeta co. as a public accountant? Have you done their work along that line? A. Yes, sir.

Q. These computations, both in the recapitula-

(Testimony of Frank W. Hamiel.)

tion on the first page and on the explanatory pages following, were those computations made under your supervision and direction? A. Yes, sir.

Q. And did you check them? A. Yes, sir.

Q. Can you state they are accurate, according to the Exhibit 40? A. They are.

Q. And the information supplied to you by Mr. Lysfjord and Mr. Waldron? A. Yes, sir.

Q. Did you use any other exhibits in preparation of those two documents, Exhibits 38 and 39 for Identification? Did you use the aabeta co.'s account book which I show you?

A. Yes, sir, we used the account book; the general ledger, too.

Q. Did you use Mr. Lysfjord's income tax return? A. Yes, sir. [483]

Mr. Ackerson: I am going to mark these for identification, too, Mr. Black, without introducing them.

Mr. Black: Very well.

Mr. Ackerson: If I may.

The Clerk: Plaintiffs' Exhibit 41 for Identification.

(The documents referred to were marked Plaintiffs' Exhibit 41 for Identification.)

Q. (By Mr. Ackerson): In other words, Mr. Hamiel——

Mr. Black: Is 41 the income tax?

Mr. Ackerson: Yes, the income tax only, Mr. Black.

(Testimony of Frank W. Hamiel.)

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 41 for Identification, and ask you if these are the income tax returns which you used in connection with Plaintiffs' Exhibit 39, Mr. Lysfjord's table? A. They are, yes.

Mr. Ackerson: I will ask the clerk to mark aabeta co.'s——

Q. (By Mr. Ackerson): What do you call this book (indicating)? A. General ledger.

Mr. Ackerson: I will ask you to mark the general ledger of aabeta co. as Plaintiffs' Exhibit next in order, 42.

The Clerk: Plaintiffs' Exhibit 42 for Identification.

(The document referred to was marked Plaintiffs' Exhibit 42 for Identification.)

Q. (By Mr. Ackerson): Now, can you state, Mr. Hamiel, [484] in what manner you used Plaintiffs' Exhibit 41 for Identification in preparation of this document, Plaintiffs' Exhibit 39 for Identification, Lysfjord's exhibit?

A. We took the income from Mr. Lysfjord's income taxes for 1951 and '52, and arrived at the amount of commissions that he had earned during the year, during that time.

Q. From the Downer Company?

A. From the R. W. Downer Company only.

Q. Yes. Does that show on this Exhibit 41 for Identification? Do the commissions show on this? I assume they do some place.

(Testimony of Frank W. Hamiel.)

A. Commissions are listed here as $2,147.98—pardon me, that is wrong. That is the withheld tax. $12,739.85 was wages earned in 1951—paid in 1951; I will say that.

And in 1952 income tax return, it shows a payment for commissions from the R. W. Downer Company of $6,541.20.

Q. Yes. And you utilized those two figures in determining the commissions earned from the Downer Company during what period of time?

A. During the year 1951. The amount of income is shown on his 1952 income tax return from the Downer Company, which were for jobs that he had sold during the year 1951, but had not been paid for yet.

Q. So that you accumulated all the payments from the Downer Company on the '51 return and the '52 return in determining [485] the earnings for '51? A. That is right.

Q. Now, in what respect, if any, did you utilize Plaintiffs' Exhibit 42 for Identification, which is the aabeta co. accounts book?

A. In the computations of the Exhibit 39 we came up with a total estimated profits during the three-year period, what they would have been if they had been functioning under the theory suggested here, and from that number we subtracted the amount of profit that they actually earned during the same period from the aabeta co.'s general ledger.

Q. Well now, I think Mr. Black will forgive me for leading a little bit.

(Testimony of Frank W. Hamiel.)

Mr. Ackerson: If you don't, I know you will tell me.

The Court: If he doesn't, he can object and we will rule on it.

Q. (By Mr. Ackerson): In other words, I take it that you discussed this matter of Mr. Lysfjord's and Mr. Waldron's business with them as to their anticipated or expected profits? A. Yes, sir.

Q. And your function was to take the figures they gave you and to deduct the actual profits they made from the business——

A. That is right. [486]

Q. ——during the priod involved?

A. That is right.

Q. So that your function there was really the mechanical process, in this respect was the mechanical process of adding and subtracting?

A. That is right.

Q. And otherwise you took Mr. Waldron's and Mr. Lysfjord's information and figures, and then you used the actual figures from the books, Plaintiffs' Exhibit 42 for Identification, to determine the actual profit? A. That is right.

Q. Very well. And that is true on both, what you have stated is true on both Exhibits 38 and 39 for Identification? A. That is right.

Q. In order not to be in error, did you examine Mr. Waldron's income tax returns in determining his earnings from the Downer Company during '52? Were they submitted to you?

A. Yes, I had them on my files.

(Testimony of Frank W. Hamiel.)

Q. You did examine Mr. Waldron's income tax returns? A. That is right.

Q. And you check the income purported to be stated in Exhibit 38 with the income listed on his tax returns? A. That is right.

Q. Do you have those tax returns with you? [487] A. No, sir.

Q. Could you produce them if we asked you to?

A. Yes, sir; the copies.

Q. I mean the copies. A. Yes.

Q. I understand Uncle Sam has the originals.

Mr. Ackerson: I will lay a further foundation for these documents. I am not offering them at this time, Mr. Black.

Mr. Black: The Court please, I am going to object to these documents when they are offered in evidence, because it is our contention that they amount, in effect, to a brief on the theory of damage, which we do not accept.

And also they will attempt to go beyond the period which we submit is relevant to the consideration of damage. There are certain items in this statement which may well be relevant to consideration, but the entire document as prepared, in effect, is a brief or a position, rather than a record of performance. They are not offered yet, but I am simply reserving that position.

Mr. Ackerson: I wonder if Your Honor would care to look at them?

The Court: Yes. The Court hasn't seen them. Conventionally, the item claimed to be an item of

(Testimony of Frank W. Hamiel.)

damage is received into evidence through the testimony of a witness, and then some such witness as the one now on the stand is called [488] to give a summary.

Mr. Black: Yes.

The Court: I assume that what we are having here is a summary based upon testimony which is offered through the witnesses Waldron and Lysfjord.

Mr. Ackerson: And which will be offered through Waldron and Lysfjord, Your Honor. I am not offering them at this time.

The Court: They are for identification only?

Mr. Ackerson: That is all, Your Honor, yes.

Mr. Black: Yes.

The Court: You are put upon notice by Mr. Black. He thinks there are things in here which are not proper items of damage, and I have wondered myself, as the case has progressed, as to what time would be a cutoff time, in the event the plaintiff is to recover, that is, if there has been a trust of the type you alleged and if the plaintiffs were damaged, how long do they continue to be damaged? Or does damage all accumulate by some date and then is cut off? If so, has that date occurred?

Mr. Black: We have briefed the point, if Your Honor please, on both sides rather extensively.

Does Your Honor wish oral argument on that point now, in addition to what we have said in our memoranda?

The Court: No. [489]

(Testimony of Frank W. Hamiel.)

Mr. Black: Because that precise point has been briefed. To summarize it, our position and Mr. Ackerson differs with us on that score, is that in this action damage resulting from acts done up to the time the suit is commenced is the limit of recovery.

The cases hold that in the question of a wrongful refusal to sell, if it is a wrongful refusal to sell, that is a series of continuing acts. In point of law there is no one single refusal.

Therefore, for any damage, if there were any damage sustained by any wrongful acts, if there were any wrongful acts subsequent to the filing of the complaint, such damage would have to be based upon a second suit alleging and proving, if the case comes to trial, there was not only a continued refusal, but that such continued refusal was based on a continuing participation in a conspiracy.

So that under the well-settled law in our position the damage date is limited to acts that were done, refusals to sell, only up to the time the complaint was filed in July, 1952.

Now, any damage that can be shown to have resulted from refusals to sell up to that date, even though the damage was sustained subsequent to that date, may be recovered if there is a recovery. But the cases completely, in our submission, unlike the case upon which Mr. Ackerson relies, where there [490] was a single tortious act, namely, a forced sale of a building with a 15-year lease on it, where a physical piece of property was taken away

(Testimony of Frank W. Hamiel.)

from the plaintiff, obviously, in that situation the damage flowing from that single wrongful act may be recovered in the action, because the wrongful act had been done prior to the commencement of the action, even though the damage was sustained beyond that date.

Not so in our case. Our case is the typical case of a refusal-to-sell situation, and if we ever get to the issue of damages in this case, it is within the principle of the authorities cited to Your Honor, which I have just summarized. [491]

Mr. Ackerson: I would like to reply very briefly, your Honor.

Of course the plaintiffs' position is simply this, that this present situation is exactly analogous to the Brookside case excepting only that the court there limited the right of recovery to the length of the lease, 15 years.

In other words, there was on tortious act there. A subsidiary of Fox West Coast, as an act of the conspiracy, compelled the sale of this theatre.

The Court: But it was one sale.

Mr. Ackerson: It was one sale. This is one cut-off. We were authorized and then we were disenfranchised. There has never been an act since.

Our contention is this, your Honor——

The Court: You did not have a franchise or contract for any definite period of time?

Mr. Ackerson: No, we had no written contract. They didn't give any. The evidence shows so far that these other people go on indefinitely.

(Testimony of Frank W. Hamiel)

Our position anyway is this, your Honor, that rather than being limited by the 15-year term of the Brookside case—and there are other cases cited in plaintiffs' brief which has nothing to do with the Brookside case but they involve the same principle—but rather than be limited, if we so sought to argue, we could legitimately argue, in my [492] opinion, your Honor, that we wouldn't be bound by a 15-year term. We are not a lease. The lease in this case actually is the conclusion of the jury based upon all the facts as to how long these people might have remained in business.

The difference, the distinction, which I think Mr. Black forgets is this—and I think he is talking about the Bigelow case, which is another motion picture case, as your Honor knows—but that damage in the Bigelow case, unlike one conclusive act like chopping off these plaintiffs from their source of supply, or taking a house that belonged to the Brookside people, in the Bigelow case it was a different type of continuing damage.

In other words, it was based upon a late run for pictures. These pictures are bought week by week and day by day. The plaintiffs come in and they say, we were damaged because every time, every day, we go up to buy a picture we are met with this same conspiracy, we have to play behind Joe Jones, our competitor, he milks the picture dry of its box office value, then we have to play it. Now that is a continuing damage by a continuing conspiracy.

(Testimony of Frank W. Hamiel)

And of course I don't contend but what the statute of limitations takes it and the damage is chopped off day by day because every day there is a new act under the conspiracy, every day there is a new piece of damage resulting from that act. They buy "Gone With the Wind" one week and they are held [493] behind their competitor as a result of a conspiracy.

The next week, they buy "Mr. Deeds Goes to Washington"—and, by the way, you can tell the last time I was to a picture show—but anyway the conspiracy continues on to the next week.

The Court: You have been since then.

Mr. Ackerson: I remember them, anyway.

But that is the situation that Mr. Black I think has inadvertently, and I say mistakenly, confused with the situation where a person is put in business, he proceeds in business and all of a sudden, through a tortious act, his business is taken away from him.

There is no evidence in this case that it was the custom of the trade for people to come up, let us take the other Flintkote dealers, to come up day by day and say, Mr. Flintkote, can I buy some more Flintkote tile today? No. They buy it once and they are terminated once, and that is finis.

So I think that is the distinction and I think that is the difference in our point of view, Mr. Black's point of view and mine. I think Mr. Black is confusing a continuing day to day conspiracy and the effects of the overt acts of that conspiracy with the

(Testimony of Frank W. Hamiel)

day to day damage resulting therefrom as distinguished from a case which I think is very parallel to the Brookside case and the other cases mentioned in Plaintiffs' memorandum, your [494] Honor.

The Court: Unfortunately, these memoranda on both sides were not filed until we were in [495] trial.

Mr. Ackerson: I realize that.

The Court: And unfortunately perhaps the court has been busy on one case in the morning and another in the afternoon continuously since then, and there are just so many hours in the day that you can read these things.

Mr. Black: Let me call——

The Court: So I am a little bit behind your thinking on it by reason of not having read everything that you have cited.

Mr. Ackerson: I realize that.

Mr. Black: Let me briefly state our position in reply to Mr. Ackerson. I think I won't be too long about it.

We don't rely on the Bigelow case as such. The only significance of that case is that the Supreme Court in that case pointed out that there were two actions, one suit for damages sustained up to the time the original suit was brought, and a second action for damages sustained subsequent to that date. And the Supreme Court recognized the propriety of that procedure.

The case which we have found most analogous to

(Testimony of Frank W. Hamiel)

the present situation in our estimation is a case that just couldn't be more on all fours with what we are dealing with here, and that is the case of Connecticut Importing Company v. Frankfort Distillers, a case in the Second Circuit, 101 F. (2d) 79——

Mr. Ackerson: Is that cited in the brief? [496]

Mr. Black: That is cited in the brief.

Mr. Ackerson: Thank you.

Mr. Black: That is in 101 F. (2d) 79.

The facts in that case were that the plaintiff recovered a judgment for treble damages in a suit brought under the Sherman Antitrust Act and tried to a jury. The plaintiff was a distributor in Connecticut for products manufactured by Frankfort Distillers, one of the defendants. The other defendants were distributors of the same products in Connecticut.

Plaintiff refused to conform to an agreement to maintain fixed prices and as a result he was cut off by the defendants from any further supply.

The court and jury found that this cut-off was the result of a conspiracy to maintain prices improperly, and that in consequence it was proper for a verdict to be recovered by the plaintiff.

However, the court in that action limited the recovery to damages which were sustained from refusals to sell up to the period that the action was brought. And on appeal the Circuit Court of Appeals had this to say:

"Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those

(Testimony of Frank W. Hamiel)
sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. Frey & Son, Inc., v. Cudahy Packing [497] Co., 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced. Lawlor v. Loews, 235 U. S. 522-536, 59 L. Ed. 341. Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

So that in this case the issues, if there were a second suit for damages predicated on refusals to sell after the date of the complaint was filed in here, would have to show that there was a continued refusal to sell and a continued conspiracy and that such refusal was based on the defendant being a party to such conspiracy.

It is perfectly obvious that such issues cannot be

(Testimony of Frank W. Hamiel)

tried in a suit which alleges a conspiracy which happened before this [498] action was brought.

If there is any subsequent damage to be recovered for further refusals based on a continued conspiracy, they must be the subject of a subsequent [499] action.

Mr. Ackerson: May I say just one further word, your Honor, because I think Mr. Black has substantiated my position.

There is no quarrel between the decisions cited in my brief and in Mr. Black's brief, supplemental brief.

Mr. Black pointed out the distinction, but he superimposes upon the distinction, in order to justify his position, there were continued refusals. This isn't a business where you have continued refusals. You get one refusal and you are out of business. That is it. There is no evidence to the contrary, but Mr. Black read——

The Court: What do you do then, take the life expectancy of the partners?

Mr. Ackerson: It is possible. We don't intend to do that. We don't intend to go into speculation, your Honor, but in theory that is exactly true.

We don't intend to do that. We have brought damages up to the date of trial, right now. And we know what those damages are. That isn't speculative, but there is no reason in law why you couldn't use a mortality rate and let the jury decide how long these two people would get together in the future—I mean get along with each other in

(Testimony of Frank W. Hamiel)
the future and how long they would have continued business.

But the important point in Mr. Black's argument, and I think I am quoting him—at least, I am quoting from his [500] brief—he said you can't recover damages after the filing of a complaint, unless the damages resulted from an act prior to the filing of the complaint.

I think your Honor recalls that, and I think Mr. Black stated that. His brief states, in summary—and he is referring to the Brookside case here, which is merely a repetition——

"In summary, in the Brookside case the damages allowed as compensation for injuries in part sustained subsequent to the filing of the action, but which were the direct consequence of an act done prior to the commencement of the action."

That is the distinction. Mr. Black, through argument or anything else, can't show in this case that there was any necessity, any use or any purpose in the subsequent request after Flintkote came in and said, "You can no longer buy our material." Everything stems from that act, your Honor. All damages stem from that act, and your Honor's query is correct, theoretically.

I try to try cases practically. The damage here is —I do not wish to try to prove, try to ask this jury to guess how long these two partners would stay together in the future, beyond the date of this trial. I don't want them to guess on that, although I say

(Testimony of Frank W. Hamiel)

they would have a legal right on any reasonable evidence to make that guess. [501]

I am not going to ask them to do that. These tables go up to the date of the trial, May 3rd. And I say legally, and I think if your Honor reads the briefs that have been filed, and I realize it has been an imposition on the court to file them so late, but I don't think there is any doubt about that proposition of law.

The Court: I think about the only thing the courts could properly do with these cases where briefs are not filed on time is to refuse to try them until briefs have been filed. Just to simply put them off calendar.

I shall have to work Saturday and Sunday to catch up with what has been filed in this case since we started.

Mr. Ackerson: Your Honor, I filed a nine-page brief. I tried to make it brief.

The Court: It isn't just the brief, counsel, it is what is cited in the brief.

Mr. Ackerson: I realize that.

The Court: We have to read the cases. It is the custom of some of the judges, and I find it a pretty good one, where we have time to do it, to write in to the courts that have decided these cases and to get the briefs which were filed, or the records which were used in deciding the cases, so that we can better understand the decision.

You just can't do that when trial briefs are not

(Testimony of Frank W. Hamiel)

filed until the beginning of the trial. But we will try to live [502] with the situation.

I don't think I have been called on by either of you to rule now on anything.

Mr. Ackerson: No, your Honor. In fact, if it is necessary, your Honor, I will—I mean if it is necessary I think, at least, it is possible we could offer these two exhibits subject to some ruling of your Honor later.

I imagine there will be motions in this trial at the end of the plaintiffs' case, and this is probably the last, the end of the testimony.

So there may be necessity for a ruling. Perhaps a day's continuance would be advisable, if it becomes advisable. But there is no—in view of the fact that, as your Honor stated, These briefs were filed late, none of them are lengthy so far as the briefs go, but there are cases cited in them, that is true, your Honor.

But I am sure both parties would be happy to follow any suggestion the court may have along that line.

The Court: Mr. Lysfjord hasn't finished his direct examination?

Mr. Ackerson: No, he hasn't.

The Court: I assume there will be considerable cross-examination?

Mr. Ackerson: Yes.

The Court: This witness is going to be cross-examined. [503] From the pace the case is going, that it has taken, I suppose these events will prob-

(Testimony of Frank W. Hamiel)

ably take us through Friday, and I can catch up with my reading over the week end.

Mr. Ackerson: I would think, your Honor, I can't judge—I don't know how long Mr. Black's cross-examination of Mr. Lysfjord would be, but I anticipate after this witness on direct perhaps an hour or two of examination, direct [504] examination.

The Court: Well, let's get on with the testimony. You haven't offered these yet.

Mr. Ackerson: I have not offered them. I intend to put Mr. Lysfjord and Mr. Waldron on before I do.

The Court: All right. Well, I am simply alerted then to not make any fishing dates for the week end.

Mr. Black: We regret that necessity. If it is any comfort to your Honor, we haven't been spending our week ends fishing, either.

Mr. Ackerson: I am sory to say my own brief, your Honor, appears to be just a little bit sloppy, shall we say. It was because I delved into it Saturday and dictated Sunday and filed it Monday. You can't do perfect work that way.

The Court: Well, it is a sorry state to see counsel so badly rushed when the case has been pending as long as it has.

Mr. Black: May I suggest an extenuation there? There are such things as issues that come up at the time of trial that we just can't predict in toto as to what is coming on.

Mr. Ackerson: Leaving this foundational testi-

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mony, I wish to use this witness for one other purpose, your Honor, very limited purpose.

Q. (By Mr. Ackerson): Mr. Hamiel, were you ever in the acoustical tile contracting business yourself? A. Yes, sir. [505]

Q. What was the name of your company?

A. Allied Construction Speciality Company.

Q. What line of tile did you handle?

A. Simpson tile.

Mr. Black: What is the name?

The Witness: Simpson.

Mr. Black: Simpson. Oh, yes.

Q. (By Mr. Ackerson): From whom did you buy that tile? A. California Panel & Veneer.

Q. Did you obtain, if you know, manufacturer's list price on your purchases of that tile?

A. I didn't understand your question.

Q. Did you pay the manufacturer's list price or did you pay a markup, a price marked up for that tile, while you were in business, if you know?

A. The manufacturer's wholesale price is what we paid.

Q. Is that the same price that Mr. Lysfjord, for instance, bought this carload of tile from Flintkote Company?

A. It would be very close. I couldn't say it was exactly. As I remember, it was 10.2, Simpson tile was at that time. That was several years ago.

Q. Yes. Is that the tile you used in your business as an acoustical tile contractor? A. Yes, sir.

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Q. Were you able to continue along with that tile? [506] A. No.

Q. Would you state what, whether you lost the Simpson line or the franchise, was that it?

A. At the time we started in business, the Simpson tile was a new product and they had a lot of trouble in production of the tile, mechanical difficulties with their drills. They weren't able to supply us with tile of a quality that was acceptable to the public.

Because of the fact that we had made contracts which called for tile acceptable under certain specifications, we had to buy tile from the outside, in order to fulfill those.

Q. I see. Now, from whom did you buy the tile from the outside?

A. I don't remember the names of the vendors. There were quite a few of them.

Q. What did you pay for that tile compared to your Simpson price?

A. Considerably over the wholesale price we would have with Simpson.

Mr. Black: I think this is getting a little far afield, if the court please, unless it is related in point of time to the exact period we are talking about, I can't see how it can have much relevancy to the issues involved here, as to comparative prices. [507]

Mr. Ackerson: I am not introducing it for that purpose, your Honor. I don't think it is too important, in view of the evidence that is already in the record.

(Testimony of Frank W. Hamiel)

The purpose is merely to show the necessity of being on a competitive basis, in order to stay in business.

If your Honor has any objection to it, or Mr. Black has any objection to it on that ground, I will forego the examination.

Mr. Black: It seems to me it is incompetent, irrelevant and immaterial as to what reason this particular man had to stay in business. There are too many personal variables to deal with that.

The Court: Are you objecting on that ground?

Mr. Black: That, among others.

Mr. Ackerson: You may cross-examine, Mr. Black.

Mr. Black: If the court please, without prejudice to our position, this exhibit is not admissible in evidence, but I wanted to interrogate the witness about some of the figures appearing on it. I think I have a right to do that under well settled principles.

The Court: Certainly.

Mr. Ackerson: I will stipulate there will be no prejudice, Mr. Black. [508]

Cross-Examination

By Mr. Black:

Q. Now, Mr. Hamiel, I will ask the clerk to supply you with the two documents in question, or do you have them with you?

A. Right there (indicating).

The Clerk: Exhibits 38 and 39.

(Testimony of Frank W. Hamiel)

Q. (By Mr. Black): Now, referring to No. 39, which is Elmer Lysfjord's——

The Court: I have been looking at the clock, the courthouse clock. It is about ten minutes after 2:00. By my watch is it almost 3:00.

Mr. Black: It is about eight minutes to 3:00.

The Court: Would you like to take the afternoon recess before starting this cross-examination?

Mr. Black: I think it would be just as well if we can do that.

The Court: All right.

(Short recess taken.) [509]

Q. (By Mr. Black): Mr. Hamiel, will you kindly turn to Exhibit No. 39, and I refer to the second calculation on that page, starting with "Actual cost of tile purchased." Do you find that figure? A. Yes, sir.

Q. $87,808.97? A. Right.

Q. And then the next line is "Estimated cost from distributor based on 17 per cent overpayment for tile," and you arrive at a figure of $66,503.40.

A. That is right.

Q. Now the second figure should be the result of dividing $87,808.97 by 1.17, should it not?

A. Yes, sir.

Q. Will you do that operation, please?

A. (Making calculation.)

Q. Have you made that calculation?

A. Yes, sir, but I don't get the same answer I got from the figure from the machine.

Q. Your answer is $75,050.40, is it not?

(Testimony of Frank W. Hamiel)

A. Yes, sir.

Q. And the difference therefore instead of being $21,305.57 is $12,758.57, is that correct?

A. I didn't continue it. I will continue it. (Making [510] calculation.) That is right.

Q. And the share of that chargeable to Mr. Waldron and Mr. Lysfjord would be half of that figure, I presume? A. Yes, sir.

Q. Or $6000 plus? A. Yes, sir.

Mr. Ackerson: What is the figure?

The Witness: I will divide it. (Making calculation.) $6174. Am I correct?

Mr. Black: I didn't do that last operation. I got down to the $12,000 figure, Mr. Hamiel.

Q. Did you get those figures originally from Mr. Lysfjord or Mr. Waldron or did you make that mistake yourself?

A. The mistake was made in the machinery, I am sorry. I should have rechecked it manually but it was done on machinery.

Q. You must have hit the wrong key?

A. Either that or there might have been a total in the machine. I couldn't say as to what caused it, sir.

Q. Well, now, the figure, Mr. Hamiel, of $87,808.97 is the total of the invoices in the group that has been just simply offered for identification?

A. That is right.

Q. That includes some items that are not tile, doesn't it? [511]

A. It includes some items that are not acousti-

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cal tile, as it is commonly known, decorative tile.

Q. Is nails known as some kind of tile other than acoustical tile?

A. No, sir, but they are used in the preparation of tile.

Q. But you include nails in that figure, don't you?

A. There is quite a pile of invoices there. I can't remember whether they were all exactly tile or not.

Q. What information do you have that Mr. Lysfjord and Mr. Waldron had to pay 17 per cent more for nails?

A. The 17 per cent was based not on the cost of the invoices but on the cost of the tile per square foot. It had no relationship to the total dollar value.

Q. The total dollar value, that $87,000 figure is the total dollar volume of the invoices, isn't it?

A. Yes, sir.

Q. And you have applied 17 per cent to that total dollar figure, haven't you?

A. But the 17 per cent was not obtained by the total dollar volume other than in the amount of money.

Q. That is right.

A. I see what you mean. Yes.

Q. But if it be the fact that there are nails and other things like that included in the $87,000 figure, you [512] have applied 17 per cent then to nails as well as to tile, haven't you? A. Yes, sir.

Q. Whatever is in that bunch of invoices you have worked it out on that calculation?

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A. That is right.

Mr. Black: Now with the permission of Mr. Ackerson—and this may slightly be out of order as relates to your direct examination but in the intest of saving time while you are on the stand I want you to refer to Exhibit No. 16, which is a profit and loss statement already in evidence.

May we have that exhibit, Mr. Clerk, Plaintiffs' Exhibit 16?

(The exhibit referred to was passed to counsel.) [513]

Q. (By Mr. Black): I show you Plaintiffs' Exhibit No. 16, Mr. Hamiel, that has already been offered in evidence, and we understand that this was prepared by you? A. Yes, sir.

Q. It was based on the aabeta co.'s books and fundamentally from the ledger that has been offered for identification? A. Yes, sir.

Q. It has been suggested that this statement of profit and loss reflects only the sales of the Flintkote tile. Do you have any opinion on that subject one way or the other? A. No, sir.

Mr. Black: Will you kindly mark these for identification, please, as our Defendant's Exhibit next in order?

The Clerk: Defendant's E, F and G for identification.

(The documents referred to were marked Defendant's Exhibits E, F and G for identification.)

(Testimony of Frank W. Hamiel)

Mr. Ackerson: Have I seen those, Mr. Black?

Mr. Black: I don't think you have. This is a simple mechanical operation of taking the items from your own books which bring about this cost of sales, that $15,000.00 figure, and refers to your ledger.

This is the breakdown of these figures here (indicating). These are inventory transfers; this is the Flintkote material (indicating). [514]

Mr. Ackerson: You are going to connect those up with those, are you?

Mr. Black: Yes, to reconcile that figure. It appears only $4,000.00 of Flintkote material is included in here.

Q. (By Mr. Black): Now, referring first, Mr. Hamiel, to the figure in Plaintiffs' Exhibit No. 16, showing the item, Cost of Sales, $15,552.94.

A. Yes.

Q. I show you a worksheet prepared under our supervision, which is based upon a check of the company's books, which shows the origin of this $15,687.95 figure, together with a breakdown of the individual items, arriving at that total.

A. Yes.

Q. I will ask you to be good enough to check those two sheets and take a look at the ledger before you.

A. You want me to verify this against this (indicating)?

Q. And tell me whether this summary, Exhibit F for identification—E for identification, and the

(Testimony of Frank W. Hamiel)

breakdown, Exhibit F for identification, as checked by the ledger correctly shows the basis for the $15,000.00 figure which is the cost of sales. [515]

A. (Examining records.) They appear to check with the books.

Q. Well, they seem to be correct?

A. Yes, sir.

Q. They purport to be based entirely on the books and they come out to your figure?

A. Yes, sir.

Q. Now the only Flintkote items included in that total of $15,687.95 are the two transfers from inventory, am I not correct on that?

A. Well, I was just checking the numbers.

Q. Would you glance through that then?

A. (Examining records.) These numbers here you are referring to?

Q. Yes. Those are the two items that are marked I's, marked from inventory, on the defendants' E for identification; those are the only two Flintkote items, are they not?

A. Do you get this from the journal? At the end of the accounting period the variance between the actual inventory and the amount of material that was on hand naturally is increased or decreased according to the amount of material bought and used during that period.

Q. Well, my question is: Aside from the two items that are marked from inventory——

A. Aside from that they check, that is [516] right.

(Testimony of Frank W. Hamiel)

Q. ——every item going to make up the $15,000 figure is something other than a Flintkote item?

A. I don't know what those from inventory items are composed of.

Q. I will put it this way: Everything other than the inventory items are not Flintkote items.

A. Yes, sir.

Q. So that the most there could be of Flintkote items in this $15,000 figure—and that would assume that both the inventory items are Flintkote items—would be $4,142.89?

A. I don't know that I exactly follow you.

Q. I think you said that everything on the list other than the inventory transfers are not Flintkote items?

A. I said they checked. Now I didn't read down the vendor column.

Q. Would you do so, please?

A. Yes. (Examining records.) I think that is right, sir.

Q. So that my question is, if there are any Flintkote items in this $15,000 figure they would have to be comprised of the inventory transfers?

A. No, these amounts of money—you see, we started off the inventory with a certain figure, whatever was actually in the warehouse, and we counted the value of it. It comprises many things. Materials which were purchased for installation, [517] nails and all the other sundry materials that are used in the installation of acoustical tile, are purchased dur-

(Testimony of Frank W. Hamiel.)

ing the accounting period and charged into the cost of sales.

At the conclusion of the accounting period an inventory is taken and they count all the material that is left. It obviously would be different, higher or lower, than the material that the inventory that they started with showed. These numbers increase or decrease the inventory figure to bring it to its proper level, that is all. It is merely a bookkeeping transaction. It has nothing to do with actual materials that are bought and sold.

Q. Well, when an item is transferred from inventory it is charged to cost of sales, is it not?

A. Yes, sir.

Q. And that is what you have done with these two operations here?

A. But actually I can't say that they are tile or what they are.

Q. My question is—you say you can't tell what they are—but the only thing that could be Flintkote items would be these inventory transfers?

A. That would be if there were any, which I didn't check the vendors' names against the books.

Q. I understood you had just done so.

A. I checked the numbers. I understood you wanted me [518] to check the amounts.

Q. You just checked the vendors and you said there were no Flintkote names?

A. That is correct.

Q. My question is, if there are any Flintkote

(Testimony of Frank W. Hamiel.)

items in this $15,000 figure, it would have to be at least a part of the inventory transfers?

A. That is right.

Q. And that totals $4,142.89?

A. That is right.

Q. And that is the maximum amount of Flintkote products that could be included in the $15,000 figure? A. Yes, sir.

Mr. Black: I will offer this exhibit in evidence, if the court please.

Mr. Ackerson: No objection, Mr. Black.

The Court: Received.

The Clerk: Is that E, F and G, Mr. Black?

Mr. Black: Yes, E, F and G.

(The exhibits referred to were received in evidence and marked as Defendants' Exhibits E, F and G.)

Q. (By Mr. Black): Now the records, at least for the year 1952, Mr. Hamiel, were kept on a modified cash and accrual basis, is that [519] correct? A. Yes, sir.

Q. And except at year end there was no account taken of accounts payable in making up the statement of profit and loss? A. No, sir.

Q. So that this statement, this six-month statement for the year 1952 which we have just been talking about, doesn't show accounts payable at the end of that period?

A. Not as I remember it, no, sir.

(Testimony of Frank W. Hamiel.)

Mr. Ackerson: Have you got it? Can the witness see it?

Mr. Black: That is the same exhibit. It is just a summary.

The Witness: Accounts payable don't appear on the profit and loss statement.

Mr. Ackerson: I don't know. I am not an accountant.

Q. (By Mr. Black): But at year end you did take them into account, did you not?

A. Yes, sir.

Q. And that is what you have done for the balance sheet as at December 31, 1952?

Mr. Ackerson: Mr. Black, do you want to introduce that? I neglected to do so.

Mr. Black: Yes.

Mr. Ackerson: If you wish, go ahead. [520]

Mr. Black: May I have it marked for identification?

Mr. Ackerson: You can make that a plaintiffs' exhibit if you wish, or you can make your own. I don't care.

The Clerk: Is this a defendants' exhibit?

Mr. Black: Yes, you can make it our number next in order.

The Clerk: Defendants' Exhibit H.

(The exhibit referred to was received in evidence and marked as Defendants' [521] Exhibit H.)

Q. (By Mr. Black): I now show you a balance

(Testimony of Frank W. Hamiel.)

sheet and a profit and loss statement for the year 1952. The balance sheet as of December 31, 1952, and profit and loss statement for that entire calendar year. A. Yes, sir.

Q. You prepared that, did you not, Mr. Hamiel?

A. Yes, sir.

Q. Will you kindly state what the net profit for the year 1952 was, as disclosed by that statement?

A. $4,860.14.

Q. Now, that would not, however, mean that that was a reflection of a change from a profit of over $8,000.00 at June 30th, down to a profit of only $4,800.00 in the last six months? It wouldn't necessarily mean that, would it? A. No.

Q. Because of the fact in the six months' period you do not take into account accounts payable?

A. There are quite a few factors that weren't taken into account at the middle of the year.

Q. So that you don't get a true picture of net profit by this semiannual statement for that reason, and perhaps for other reasons?

A. No, just a trend was all.

Q. Now, referring to Mr. Lysfjord's income tax return for the year 1951—— [522]

Mr. Black: Do we have that, Mr. Clerk, please?

The Clerk: Yes, sir.

Q. (By Mr. Black): ——the only income shown on that return is that derived from the R. W. Downer Company, am I correct on that?

A. That is right.

Q. Will you state the total of that figure?

(Testimony of Frank W. Hamiel.)

A. $12,739.85.

Q. Now, this return, was that prepared by you, by the way? A. Yes, sir.

Q. It is prepared on a cash basis, is it not?

A. That is right.

Q. So that that figure of $12,739.85 would reflect commissions perhaps earned in 1950, but not paid until 1951? A. It could have, yes, sir.

Q. So that when you take your 1952 return and throw that back into 1951, to arrive at a $1,500.00-a-month earning basis, did you also deduct commissions that had been earned in 1950, but which were recorded in the 1951 return? A. No, sir.

Q. As to that $1,500.00 figure, it would probably be distorted? A. $1,500.00?

Q. For a figure of $1,500.00 a month. I am referring [523] to your calculation.

A. In any——

Q. Just a moment. I think maybe I should make myself clear. I perhaps did not do so.

On page 2 of this Exhibit 39 for identification we show a figure of $1,580.00, as salesman's profit. That is a figure, a monthly figure, isn't it?

A. That is right.

Q. Did you make out that figure?

A. Yes, sir.

Q. You arrived at it, did you not, by taking the entire income for the year 1951? A. Yes.

Q. And then adding to it the 1952 income?

A. From the Downer Company.

Q. From the Downer Company? A. Yes.

(Testimony of Frank W. Hamiel.)

Q. And then dividing—— A. By 12.

Q. But you included in it all of the $12,739.85 in the 1951 income? A. Yes.

Q. And that figure could include commissions that were, in fact, earned in 1950, but which weren't paid until 1951, could they not? [524]

A. It could, yes.

Q. To get a true figure, if you are going forward in '52 and figure out a monthly income, you should deduct the commissions earned in '50 that are reflected in the '51 income tax return? Am I not correct on that? A. Yes, sir.

Q. You didn't do that?

A. No, because we didn't know which ones. We didn't have a copy of the '50 income tax return, first of all.

Q. So you simply put them in, anyway?

A. No, sir, that wasn't it at all. This was the only information we had to figure from, and, as I said, that was based upon information given me.

Q. But if there were any commissions that were, in point of fact, earned in '50, but not paid in '51, it could distort the figure, could it not?

A. If there were, yes, sir.

Q. Now, referring to Exhibit 39, do you have it in front of you?

On the second page of that the last calculations on that page refer to the approximate cost of one carload of tile as $8,000.00. You say the average sales price of a carload of tile is $18,000.00; approximately 30 per cent of $18,000.00 is gross profit.

(Testimony of Frank W. Hamiel.)

What did you base that 30 per cent figure on, Mr. Hamiel? [525]

A. It was given to me by Mr. Lysfjord and Mr. Waldron.

Q. You didn't make any attempt to check it yourself?

A. Only to the extent that I know that when I was in business we used that figure.

Q. Do you know what the actual experience of the aabeta co. was? A. No, sir.

Mr. Black: I am, of course, unable to check Mr. Waldron's income tax returns. I presume that will be made available?

Mr. Ackerson: That will be made available, Mr. Black.

Mr. Black: May I ask him questions about it?

Mr. Ackerson: You may.

Mr. Black: Because I don't want to bring him back.

Mr. Ackerson: You may, certainly.

Q. (By Mr. Black): Did you go through a similar operation to determine Mr. Waldron's net income?

A. No, sir. Mr. Waldron gave me the figures we started off with.

Q. Did you use his income tax return as a basis?

A. No, sir.

Q. You didn't examine them in that connection?

A. No.

Mr. Black: I think that is all, Mr. Hamiel.

Mr. Ackerson: I have one or two questions. [526]

(Testimony of Frank W. Hamiel.)

Redirect Examination

By Mr. Ackerson:

Q. Mr. Hamiel, forgive me if my questions are not pointed, as I am not an accountant.

Mr. Black has asked you concerning the exhibits relating to the income taxes. Do you have those there?

Will you turn to Mr. Lysfjord's 1952 income tax return and tell me what figure you have relating to his Downer income? A. $6,260.81.

Q. Is that the '52? A. Yes, sir.

Q. You have no way of knowing how much of the '51 income reported from the Downer Company was earned in '50, have you? A. No.

Q. And vice versa, of course, for the prior years?

A. No, none at all.

Q. You don't know then whether or not the $6,000.00 attributed to the 1952, reported on the 1952 income tax, may or may not balance out what was collected from the prior year of 1950 and added to the '51 tax, do you? A. No, sir, I don't. [527]

Q. Now Mr. Waldron, you stated, gave you the figures which you used regarding his income from the Downer Company during 1951?

A. Not exactly, sir. I said that he gave me the figure that he was earning when he left the Downer Company.

Q. What were those figures, for what period of time, approximately?

(Testimony of Frank W. Hamiel.)

A. I understood he said he was making about $1,250 a month when he left the Downer Company.

Q. And that was the basis that you used?

A. Yes, sir.

Q. Now, did Mr. Lysfjord make any statement to you or did you use similar figures for him in addition to his income taxes?

A. We used Mr. Lysfjord's income tax to predicate his average earnings per month.

Q. And that was the basis of your figures for Mr. Lysfjord? A. That is right.

Q. You did not inquire into what his last few months' salary was? A. No, sir.

Q. At the Downer Company? A. No, sir.

Q. Now on this first figure—I think I am getting [528] into something, Mr. Hamiel, that I am going to have to ask Mr. Lysfjord and Mr. Waldron about.

At any rate, your testimony as a whole is that other than Plaintiffs' Exhibit 40 for identification, including the invoices, which was a mechanical operation on your part, was it not——

A. Yes, sir.

Q. ——the information was supplied to you either through Mr. Lysfjord's income tax returns or through information supplied to you, figures supplied to you, by Mr. Lysfjord and Mr. Waldron?

A. That is right.

Q. And you assisted in the computing angle of that data? A. That is right.

(Testimony of Frank W. Hamiel.)

Q. In connection with the matter of Exhibit 40 for identification, do you know—you yourself have personal knowledge—as to whether or not the $87,808 figure on each Exhibit, 39 and 38, included prices paid for such things as nails, cement, or do you know whether or not they were limited to the price paid for acoustical tile?

A. My understanding was that they were—the recapitulation page which was prepared from all of those invoices, in all cases except one, lists a price per unit per square foot of tile that was [529] purchased.

Q. Do you find any reference to such items as nails or cement or the complementary materials that go into an installation job?

A. There are a few.

Q. Will you give the amounts and the items that you see there?

A. There were nails in the amount of $40, there were nails in the amount of $3.70, there were nails in the amount of $5.50, staples in the amount of $19.50, staples in the amount of $11.70.

Q. And other than that can you state that this $87,000 plus figure was acoustical tile, or do you know?

A. It is acoustical tile or decorative tile.

Q. But it is all tile? A. Yes, sir.

Mr. Ackerson: I think that is all.

Mr. Black: One question.

(Testimony of Frank W. Hamiel.)

Recross-Examination

By Mr. Black:

Q. Isn't it possible, Mr. Hamiel, that some of that is insulation board?

A. Yes, sir, insulation board.

Q. That is not acoustical tile, is it?

A. Well, I am not conversant with the definitions.

Q. You used to be in the business, didn't [530] you?

A. That is right. But my part of the business was not connected with the actual installation of tile.

Mr. Black: That is all.

(Witness excused.)

Mr. Ackerson: I will recall Mr. Lysfjord.

ELMER LYSFJORD

recalled as a witness by and on behalf of the plaintiffs, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Ackerson:

Q. Mr. Lysfjord, when we adjourned yesterday you were going to look over some files and determine whether or not you could testify in a similar vein with regard to the Downer documents and the acoustical tile contractors' job folders. I am show-

(Testimony of Elmer Lysfjord.)

ing you Plaintiffs' Exhibit 27 and Plaintiffs' Exhibit 30 for identification, and ask you if you examined those documents over the evening?

A. I did.

Q. How many of the folders or how many jobs in the Exhibit 30 for identification did you find corresponded with the jobs listed in Exhibit 27?

A. Only one.

Q. And did you find any relationship otherwise?

A. I don't understand you.

Q. I mean, did any of the other jobs in [531] Plaintiffs' Exhibit 30 have any bearing on the other matters listed in the other exhibits?

A. No, sir.

Q. What job did you find corresponded in Plaintiffs' Exhibit 30 with the jobs listed in Plaintiffs' Exhibit 27?

A. The Washington Street School, or a Washington School.

Q. That is the first one on Plaintiffs' Exhibit 27?

A. Yes, sir.

Q. And will you tell us according to the Downer records, Plaintiffs' Exhibit 27, what company performed the Washington Street School job?

A. The Paul H. Denton Company.

Q. Can you tell us from that document what the Paul H. Denton Company was purported to have bid on that school, according to the Downer records?

A. Yes, sir. $3,271. There is an additional figure of $1,268.

(Testimony of Elmer Lysfjord.)

Mr. Black: I can't hear you. May I have that last figure?

The Witness: $1,268.

Mr. Black: Thank you.

Q. (By Mr. Ackerson): And what do the Downer records show with respect to the Downer bid? [532]

A. The Downer bid was $3,435. And the second figure was $1,332.

Q. Now, can you turn to that bid and tell us what the Denton Company bid on the job?

A. A total contract of $4,539.

Q. Now, Mr. Lysfjord, I am going to call your attention to Plaintiffs' Exhibit 39 for identification, which I now hand you. Will you tell us what your part was in compiling that exhibit?

A. I was present at the offices of Mr. Hamiel and we went through the income taxes of previous years for me, and also consulted our books, our general ledger here, for information required to answer these questions.

Q. Did you also consult the documents contained in the exhibit before you, Plaintiffs' Exhibit 40 for identification? That is the other document.

A. The income tax?

Q. No, the file of invoices here.

A. Oh, yes, sir.

Q. And did you personally supervise and instruct the compilation and examination of Exhibit 40 for identification?

(Testimony of Elmer Lysfjord.)

A. Mr. Hamiel had a girl in to do the mechanical aspects of it. However, I answered——

Mr. Black: Pardon me. Did you say Exhibit 40?

Mr. Ackerson: Those were the invoices. [533]

Mr. Black: Oh, yes. I am sorry.

Q. (By Mr. Ackerson): Go ahead, Mr. Lysfjord.

A. I was saying, Mr. Hamiel had a girl in to do the mechanical gathering of this information from our files. [534]

Q. At your request? A. Yes, sir.

Q. Go ahead.

A. Occasionally there was a question asked of me, what was to be included, because this girl was not familiar with the type of work we had been doing. I will answer this question about nails asked before——

Q. I will get into that, Mr. Lysfjord.

A. Oh.

Q. Anyway, you participated in the supervision of going over those files with the girl and Mr. Hamiel, is that correct? A. Yes, sir.

Q. Now, the question has come up as to just what this compilation—and I am calling your attention to the figure $87,808.97—that is on the first page, and is explained thereafter. Can you explain what that figure consists of?

Q. It consists of the total that this office girl arrived at in checking all invoices pertaining to acoustical tile.

(Testimony of Elmer Lysfjord.)

Q. Can you state that it is limited to acoustical tile, do you know?

A. To the best of my knowledge, it is. It was instructed to be done that way and when questions would come up in gathering this information, as to what would be included, [535] the girl was instructed only acoustical tile.

Q. Your instructions included to eliminate such things as nails or other items?

Mr. Black: Let the witness state what his instructions were.

Mr. Ackerson: Yes.

The Witness: My instructions were to include only acoustical tile. I had answered in the gathering of this material certain questions as to an invoice pertaining to acoustical tile might contain in its total some acoustical nails that were purchased at this same vendor's establishment. Those were written down at the time and were crossed out and not added in the total.

Q. (By Mr. Ackerson): So that the total of $87,808.97, can you state, is substantially all acoustical tile?

A. Yes, sir, to the best of my knowledge.

Q. Now, we have this figure on the top of the page, Exhibit 39, of commissions and expected profit, seven months, at $3,160.00 per month, which equals $22,120.00.

Can you explain how you arrived at that figure?

A. Yes, sir. We started—Mr. Hamiel and I

(Testimony of Elmer Lysfjord.)

started basing the earnings that I had earned, shall I say, in the past, as $1,580.00, and basing——

Q. $1,580.00 what?

A. Per month. And going further along that line, the [536] approximate profit on all acoustical tile jobs is about 30 per cent.

Q. How do you arrive at that conclusion?

A. It has been my experience that that is about what it is. Sometimes it is a little higher, sometimes a little lower, depending on the luck, shall we say, that you have in getting a job done the way you figure it.

Q. But based upon your experience, then, would you say it was 30 per cent? A. Yes, sir.

Q. Proceed.

A. Contained in that 30 per cent are three items. The first 10 per cent would be for an overhead factor, clerical help, things like that, warehouse costs.

The second 10 per cent would be the amount generally paid to a salesman for his efforts.

The third 10 per cent was the company's portion of the 30 per cent.

Q. Profit? A. Profits, yes.

Q. Are you stating that this formula you are using was based upon your experience as a salesman? A. And an owner.

Q. And an owner. Very well. And from that can you proceed and say how you calculated and came to the figure of [537] $22,120.00 for the first seven months?

(Testimony of Elmer Lysfjord.)

A. Well, I used the $1,580.00 per month figure again as the amounts of money I had been earning in the past as a salesman.

And in going into my own business I was entitled again to the owner's part of the 30 per cent markup, which would double that figure, or a gross profit of $3,160.00, as my portion of my efforts.

And using the seven-month period that we are talking about at the present, multiplying those two figures, you come up with $22,120.00. It is my anticipated earnings——

Mr. Black: Just a moment. I have no objection to laying the foundation as to how this document was prepared. But I think we will have to object when the witness goes beyond that and attempts to, in effect, announce that he has been damaged by such-and-such a figure, when, obviously, it is a highly debatable question whether the item is or is not a proper element of the damage at all.

The Court: Sustained.

Mr. Ackerson: Your Honor, I am—did you sustain it?

The Court: Yes. But if you think I was too quick on the trigger, you may try to talk me out of it.

Mr. Ackerson: I merely meant to state, your Honor, that any allegation, or, I mean, any statement which Mr. Black might properly deem prejudicial to his contentions, I have [538] to agree with, and I know Mr. Black knows this is not intentional,

(Testimony of Elmer Lysfjord.)

but it is a question of how we get this basis in here and avoid that.

I would stipulate that any such statement should be stricken or the jury should be cautioned, even without the court's ruling.

Mr. Black: I suggest that we could limit this interrogation to such items as are not self-explanatory from the exhibit itself, and see where we are after that.

Mr. Ackerson: Well, with the addendum on the memo, there are very few of those items except perhaps the next one. I would welcome any suggestion, if there are any others.

Q. (By Mr. Ackerson): You have the next item here, Mr. Lysfjord, of San Bernardino expense of $960.00. How did you arrive at that figure?

A. That was gathered from the journal of the records of the aabeta co.

Q. What did it include?

A. Well, the rent on the warehouse in San Bernardino.

Q. For how long a period of time?

A. One year.

Q. You had that building under lease, did you?

A. Yes, sir.

Q. And the rent was how much a month? [539]

A. $60.00 per month.

Q. You figured twelve months' rent?

A. Yes, sir.

Q. Did you actually pay the twelve months' rent? A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. What other item does this $960.00 figure include?

A. Actual expenses in going into the area and the advertisements in local phone books, and other things of that nature.

Q. Does it include value of time spent by either you or Mr. Waldron?

A. No, sir, only exact amounts of money, out-of-pocket money, let's say.

Q. Does that out-of-pocket money show on your books, or is that estimated?

A. It is on the books.

Q. So that that $960.00 figure covers the total amount, or is that what you claim your share of the out-of-pocket money is?

A. That is what I claim is my share of it.

Q. So that the actual figure would be $1,920.00 as shown on the second page of the exhibit?

A. Yes, sir.

Q. Now, you have an item here under the $87,808.97 item of estimated cost for distributor, based upon 17 per [540] cent overhead per tile.

How did you arrive at this 17 per cent figure that apparently was used there?

A. That is the very minimum amount of markup that we paid in the past, comparing the ability to buy material direct on a carload basis at 10 cents a foot, as against buying the same or similar merchandise at 11.7 cents a foot, which is 17 per cent. That is the minimum. We had at times had to pay as high as 20 and 25 per cent above.

(Testimony of Elmer Lysfjord.)

Q. Did you get those figures from the documents contained in Exhibit 40 for identification?

A. Yes, sir.

Q. Your statement is then that the average minimum markup was not less than 17 per cent?

A. Yes, sir.

Q. On the acoustical tile purchased in the total amount of $87,808.97?

A. That is correct. [541]

Q. Now, let's get to the next figure.

The next figure I think Mr. Hamiel has straightened out. We will either recalculate that or admit the error, Mr. Black.

Now the last figure on the recapitulation page, the first page, you have the figure of $10,632.78, at the very bottom of the first page, Mr. Lysfjord. Do you see it? A. Yes, sir.

Q. That figure is what, purports to be what?

A. The difference between what we would have paid for the material that we purchased had we been able to continue buying from Pioneer-Flintkote and what we actually did have to pay for the same material.

Q. That figure purports to be half of that amount, does it not, your share?

A. The way it is written here, it is one-half of the total difference, being chargeable to me.

Q. Now let's go on to the second page of the exhibit, that is, Exhibit 39, Mr. Lysfjord. Your testimony has covered thus far, I take it, the details of the method of computation up to the profit and so

(Testimony of Elmer Lysfjord.)

on. Is there anything on page 3 of that exhibit which you have not explained?

Let's ask the specific question as to how you arrived at the first figure on page 3 of that exhibit, this figure of $21,600.

A. Well, the approximate cost of a carload of acoustical [542] tile is $6,000, and the average sales price of that amount of material is $18,000, that being approximately 30 cents a foot.

Q. How did you arrive at that 30 cents a foot figure?

A. That is an average cost of the installation using that acoustical tile.

Q. Is that based on your experience throughout the years? A. Yes, sir.

Q. Then you get to the base price for the approximate carload price, the approximate installation price, and then how do you——

A. I see. There is a comma out of place. I was trying to understand these figures so I might use the same figures because they do tally with that exception, that approximately—again we are using this 30 per cent as a gross profit on any moneys used as a total sales—and 30 per cent of $18,000 is $5,400.

Using that as a basis, one carload per month, which has been our practice, or I should say my practice in the past——

Mr. Black: If the court please, I don't think it is necessary to go into this, either. This is pure speculation on how many cars he might have sold

(Testimony of Elmer Lysfjord.)

this year, next year and the year after, and so forth. It is just a mere matter of arithmetic, and the exhibit speaks for itself.

Mr. Ackerson: I will ask one question—first, I think [543] he has a right——

The Court: You are conceding the objection then?

Mr. Ackerson: No, your Honor.

The Court: The objection then is sustained.

Mr. Ackerson: May I ask just one minute of reconsideration? There is a basis here for that, and I would like to ask the question, the direct question, as to how he arrived at the one carload a month.

The Court: You can ask that and see what happens.

Q. (By Mr. Ackerson): How did you arrive at the basis of one carload a month on this first year, Mr. Lysfjord?

A. Well, I had been doing that for some time past, selling at least one carload a month.

Q. With the Downer Company?

A. Yes, sir.

Q. How did you arrive at the figure of 1½ carloads a month for the second year?

Mr. Black: It is obvious now that that is just based on a great deal of optimism and fervent hope and pure speculation, and for the further reason——

The Court: I think the past history is admissible, but the estimate of what he would have done in the future is not.

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: Your Honor, may I be heard just a moment?

The Court: Yes. [544]

Mr. Ackerson: I have gone into that matter and I might say I have a fragmentary brief at least for your Honor. But I think the cases will show that in the absence of better proof—this goes purely to the weight of evidence—I think we have shown that both these plaintiffs are as expert in the field of sales of acoustical tile as you can become. I think they have a right to express their opinion, and we are offering it as their opinion, based upon their experience as an expert and for no other [545] reason.

The weight of the evidence from then on, I think, as the authorities will show, is for the jury. They may think this is a bad estimate, they may think it is not, but I think we have a right under the cases to give the information for whatever it is worth.

Mr. Black: Well, if the court please, I, of course, have the further objection that this extends beyond the time of filing the complaint, which is basic to all this testimony.

Secondly, we recognize the principle—and I don't believe there is any substantial dispute between us—that there must be the fact of damage proved in a certain category, and once that is done there must be an intelligent basis for calculating from that basic data.

But the cases draw the line when you get into the realm of pure speculation as to how much the wit-

(Testimony of Elmer Lysfjord.)

ness thinks he might have developed his business within a certain period, and how much he is going to make next year or how many cars he is going to sell next year. You might as well try to speculate on how much fish we are going to catch at our next Sierra fishing trip.

It is the same sort of thing. There is no question in the world but what the experience of this witness may be proved as a salesman and his skill more or less demonstrated. You can show his past history. And from there on it becomes a jury question as to what is a proper deduction to be made [546] from that data. I don't believe the witness is entitled to get up on the stand and speculate on what he thinks he is going to do two years after the events we are talking about.

Mr. Ackerson: May I be heard just a moment?

The Court: I think a deduction may be made from past experience or existing commitments but not upon an estimate. But if you want to be heard further, go ahead.

Mr. Ackerson: This is my position as far as the law goes—I have cited in the brief a case on every element and the basis for the cases holdings is this, your Honor: It goes back to the point in the motion picture cases, and many other cases, that where a plaintiff has been deprived by the act complained of, as to the matter of damages, once the fact of damage has been proved—and I don't think there is any doubt about the fact of damages being proved

(Testimony of Elmer Lysfjord.)

for whatever they are worth—then the plaintiff can utilize the best method available at hand.

Now I have cited cases to your Honor where the plaintiff has been permitted to give his best opinion and state the reasons for the normal future expectancy. I am not going to speculate 10 years from now. This is up to date.

He has been able to give his opinion or have other people give the opinion on any element of damage that is not susceptible to mathematical calculation because of the act complained of. Now I sincerely believe that that is the law and I believe [547] the cases I have cited sustain that position.

In fact, it has been applied in many cases, for instance, in your motion picture cases. A theatre is closed down because they couldn't get pictures. They sue three years later, and prove what they would have made in that dark house had it been operating on an equal run with the competing house. Now, how do they prove it? They can do it either by expert testimony and opinion, or they can say, well, we would have made as much money as the competing house.

Now, your Honor, the jury and I and Mr. Black all know that that is not mathematically and technically correct because if both houses had been playing on an equal run and availability the gross of both houses would have been diminished. But when the courts come up to the point of proving damage, they have to have some rule of thumb, and they

(Testimony of Elmer Lysfjord.)

have used it. They accept actually that measure of damage of a comparable house.

Now I say that this measure of damage here is a lot more susceptible to raising the issue, but that is up to the jury, that just goes to the weight of it. We are offering it as this witness' opinion based upon his experience as to what would have happened had he had a competitive price and a competitive line of tile up to the present date. We are not asking your Honor to go into mortality tables. If the jury believes it, it is all right; if the jury doesn't believe it, [548] that is the jury's prerogative. But it goes to the weight of the evidence and I respectfully submit that it is admissible. [549]

Mr. Black: I think it gets clearly into the realm of pure speculation and past the line the court has drawn on that basis.

We have the further objection, obviously, that we did before, that it goes beyond the period of the Complaint completely.

The Court: I will spend the evening with your briefs and the cases cited in the briefs and rule on the question tomorrow.

Mr. Ackerson: Thank you. I realize it is a little bit difficult if it is posed as a noval question. I am awfully sorry it was raised this late.

I had no right to suppose, I suppose, Mr. Black wouldn't raise it, but that happens to be the fact, and I believe I have covered it as briefly as I could in the brief that has been supplied.

(Testimony of Elmer Lysfjord.)

The Court: It is presumed everyone in the court knows the law except the judge.

Mr. Ackerson: I have had judges advise me along that line, to always presume the judge does not know it. I don't follow that.

The Court: I just don't know, so I will do some reading on it between now and tomorrow and find out. I think that is more provident than to carry on and possibly commit error. [550]

Members of the jury, we will take a recess, so far as this case is concerned, until tomorrow at 1:30. The court is recessed until tomorrow at 9:30.

(Whereupon, at 4:25 o'clock p.m., Wednesday, May 11, 1955, an adjournment was taken until Thursday, May 12, 1955, at 1:30 o'clock p.m.) [551]

May 12, 1955—1:30 o'Clock P.M.

The Court: Before we take up the Flintkote matter, I have another matter which I have discussed in chambers with counsel which I think can be disposed of very quickly.

Mr. Ackerson: May we be excused, then, for a few minutes, your Honor?

The Court: Yes; you, Mr. Black, and your clients may be excused.

(Other court matters.)

Mr. Black: Before we proceed, your Honor, we have a few routine corrections in the transcript if the court wishes to do that at this time.

The Court: Yes.

Mr. Black: We find at page 480—do you wish to follow this, Mr. Ackerson?

Mr. Ackerson: Yes, Mr. Black.

Mr. Black: ——at line 1, it seems clear that the word "message" should be "method."

Mr. Ackerson: Yes, I think that is correct.

The Court: Mr. Bailiff, will you get me my copy of the transcript?

Mr. Black: Shall I wait until your Honor's copy is here?

The Court: Yes.

Mr. Ackerson: While we are waiting, do you have a correction [553] on page 494 also, Mr. Black? On line 17 there is the word "but." I think it should be "buy" or some other word.

Mr. Black: I am sure that should be buy.

Mr. Ackerson: I believe so.

The Court: What is the one on page 480?

Mr. Black: On line 1 the word "method" should be substituted for "message."

The Court: Let the record show the word "method" instead of the word "message."

Mr. Black: I find another on at page 485, line 16. The figure "$1,541.20" should obviously read "$6,541.20."

The Court: The record is corrected to show that that figure should be "$6,541.20."

Mr. Black: And your correction at page 494, Mr. Ackerson?

Mr. Ackerson: Line 17, your Honor, the first word there, "but," I think should be "buy."

The Court: It will be substituted as "buy."

Mr. Black: I have one at 515 at line 9. The word "your" clearly should read "our."

The Court: The "y" is stricken out to make it read "our."

Mr. Black: On page 523, the 15th line, next to the last word, the word "in" should read "until."

The Court: "Until" is inserted and the "in" is stricken. [554]

Mr. Black: And at page 525, line 4, the figure "52" is an obvious error for "50."

The Court: "52" is stricken and "50" is inserted.

Mr. Black: At page 531, second line, the word "insulation" should read "installation."

The Court: "Insulation" is stricken and "installation" is inserted.

Mr. Black: Those are the only ones I have noted. There may be others, but that is all I have.

The Court: I take it that these are agreeable to you, Mr. Ackerson?

Mr. Ackerson: Yes.

The Court: Any more?

Mr. Ackerson: I have nothing further.

The Court: Having read your briefs and the authorities cited therein I think this case is more comparable to the Frankfort Distillery case than to the motion picture cases.

Mr. Ackerson: May I be heard just a moment on the Frankfort case? I read that for the first time last night. I might inject an idea.

The Court: You are rather behind in your reading, Mr. Ackerson.

Mr. Ackerson: You are right, but I might make a suggestion that might distinguish your Honor's thought. It will be very brief. [555]

The Court: All right.

Mr. Ackerson: As I read the Frankfort case, your Honor, it is impossible to say exactly what the method of dealing in the Frankfort case was. In other words, in your motion picture cases, for instance, you do have this refusal to sell day by day on a certain run, availability or clearance. I don't know—and I don't believe it can be ascertained from the Frankfort case—what the method of procedure in the liquor industry was in that area. I couldn't determine from the opinion the reason for the cut-off, whether it was such as we have here, we won't sell you any more, period, or whether it was, we won't sell you as long as you cut prices.

Now if it were the latter the decision would be entirely consistent with my position in the case because it wasn't a permanent cut-off, it was a cut-off until—I can't state that as a fact; I read the case but I tried to determine from my reading of the case what it was, and I don't find that fact there. I suppose the only thing one could do to determine the issue for certain would be to see the transcript or go into the records of the trial court for the decision itself does not make that clear, your Honor. And if the other construction of the case is plausible, then it makes the Frankfort case line up with the other cases that I have cited, and with the

Brookside case, because in one case you have a permanent, we will not sell you, period, in the [556] other type of case, we will continue to sell you under certain circumstances, and in the Frankfort case the circumstance was that you charge the right price.

As your Honor knows in that type of a case it is often common for the plaintiff to renew his—for instance, in the Frankfort case one element of damage was that he hadn't been able to fulfill orders as they came in for Frankfort whisky. It is possible in that case, your Honor, that he sent in an order to the company every time he got an order he couldn't fill. If that is the case again you did have day to day refusals and a contingent refusal initially.

In this case we don't have that. We have an absolute refusal, we will no longer sell you Flintkote tile, not for any reason but under no circumstances.

I think that is the distinction. I don't know whether that will deflect your Honor's prior opinion, but I thought about it on the way up here and I do think the Frankfort case is the only authority cited that might be applicable, and I think that that might be the distinction in the cases. [557]

The Court: In assessing damages in cases of this kind, we are confronted with the theory of how long a man may just sit back and enjoy the accumulation of damages, without doing something to mitigate.

Is he in a position of an employee, for instance, who has been wilfully discharged and has a duty to mitigate damages by seeking other employment,

or may he simply sit back and assume that he would have made the profit if he had been allowed to continue, and collect it from the responsible parties for the balance of his life?

Mr. Ackerson: What alternative do these plaintiffs have? I mean, I don't think there is anything in the evidence that shows it would have been anything but a futile act to go down from day to day and say, "Sell us."

The Court: Regardless of that, of whether it is a futile act—let's take it that it would be a futile act. They were cut off now and forever. Does that confer on them a right to be paid the money they would have made if they had been allowed to go forward, without requiring them to find some means of making money in business otherwise?

Mr. Ackerson: They have tried to do that. They have utilized that. But, to answer your question directly, your Honor, I know there are cases—I don't have the case in mind, but it is one of those picture show cases, though, which went, I believe, to the Supreme Court. I don't have it. [558] I can't cite you the case, but I can give it to your Honor in the morning, if necessary.

But the court there held that a plaintiff faced with a first-run exhibition problem—I think it might have been the Bigelow case, but I am not positive of that. Either the Bigelow case or one of those first cases.

This plaintiff had a first-run theater, that is, he claimed he had a first-run theater location, accompaniments and everything else. He had to play

fourth run. So he couldn't make a go of it, he didn't think he could make a go of it.

He was refused first run. Anyway, he made his house black. He closed his house up and turned the key.

The Court: Did that entitle him to retire?

Mr. Ackerson: The very question came up, your Honor, and they said he was bound to go ahead and keep the house open.

The court said: "No, he can quit or he can try and operate, sue for the difference, or he can close it up and wait."

Now, in this case of ours, your Honor, we are not even faced with that, because these plaintiffs did even go into other lines. They haven't done well with this acoustical tile line, but they have kept their doors open. They didn't just close up and burn things down, and sit down and say, "We [559] will await a lawsuit."

The Court: I think your procedure is to show what the damage has been between the time of the cutoff and the present time——

Mr. Ackerson: That is correct.

The Court: ——but that they are not entitled to collect any damages here—I am not expressing any opinion, whether they are entitled to collect any under any circumstances. That is going to be a question for the jury.

If the jury finds there was a conspiracy that you claim, and they were damaged, they may have their damages down to the time of trial.

And as to the future, if they have established

these facts, they will have the equitable relief of injunction as against the defendants, to protect them in the occurrence of future damages.

Mr. Black: I believe your Honor said to the time of trial.

The Court: That is right.

Mr. Black: Did you mean the time of the filing of suit?

The Court: I haven't been in a position to grant injunctive relief, so none has been granted.

If there has been damage, they are entitled to all damage which has thus far resulted. And if there has been a trust of the kind that is charged, and it has brought about [560] the results the plaintiffs contend, then it is the duty of a court of equity to say, "Don't do it any more. Stop it now." That will protect the plaintiffs in the future.

Mr. Black: The holding of the Frankfort case, your Honor, was that the damage feature was limited to the net sustained from acts done up to the time of the commencement of the suit.

Mr. Ackerson: We don't know the facts in the Frankfort case. That is the bad part of it. It may be another motion picture case of day-to-day damage. It depends on what the cutoff meant on that case; and it doesn't show.

On the other hand, the rest of the cases Mr. Black cited have been cited by me. I mean there isn't a contrary case unless the Frankfort case is.

The Court: There are few areas of law that have so many variations and so little certainty as these antitrust laws.

This court will hold that if the cause of action has been proved the plaintiffs are entitled to their damages between the time of the inception of that cause of action and the time of trial, but that the jury cannot speculate as to future damages because if the jury finds for the plaintiffs the court will treat that as an advisory verdict or finding of fact and acting in the exercise of its equity powers will restrain the defendants from committing further acts of the [561] same kind in the future.

If I am wrong on that——

Mr. Black: Yes, your Honor.

The Court: If I am wrong on it the gentlemen in the Court of Appeals will correct me. But I have come to that conclusion from reading the cases which have been cited.

We can't say that this case is on all fours with any one of the cited cases.

Mr. Black: Well, I just wanted to point out to your Honor that the very case we are talking about, the Frankfort Distilleries case, which your Honor said this case was analogous to more than the other——

The Court: I said it is more nearly analogous to it than the motion picture cases that Mr. Ackerson was talking about. It is not closely analogous to any of the cases which have been cited. There are little shades of distinction to be made in comparing all of them.

Mr. Black: Your Honor appreciates that the only point in the Connecticut Importing case was the ruling that the damages were limited to those

suffered from acts occurring up to the time of the filing of the complaint.

The Court: Mr. Black, if the result of a defendant's act is to break a man's leg and if the leg is thereafter not usable, is the damage cut off on the day he files the suit or is it cut off at the time he ceases to suffer the impairment? [562]

Mr. Black: Well, that is exactly the point. The broken leg is analogous to the lease of the motion picture house, where the physical property was taken away. That is the very point in this case, your Honor, where it is pointed out:

"Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. Fry & Sons v. Cudahy Packing Company, 243 Fed., 205. Damages which accrue after the suit is brought cannot be recovered in this action unless they are the results of acts done before the suit was commenced."

The Court: That is true. I am not holding contrary to that. Damages, if any, which are awarded here must be as a direct and proximate result of acts done before the suit was commenced, during the life of the conspiracy.

I am going to cut them off as of the time of trial, because equity can prevent further acts of the same kind occurring in the future.

Mr. Black: But, your Honor, the point is that anything—a complaint, as a matter of generalities, speaks as of the date it is filed. Events occurring be-

tween the time of the filing of the complaint and the time of trial must, if at all, [563] be picked up in a supplemental complaint.

And as this court points out, a refusal to sell is implied in law as a continued series of refusals.

There is no one act that has deprived the plaintiffs of its rights, such as taking away a piece of physical property or breaking his leg. There is an implied refusal to sell day by day as time goes on.

And as this court points out, the Second Circuit, if there is a continued refusal to sell, that is wrongful only if such continued refusal is the result of a continuing conspiracy.

Now, that poses an entirely new set of issues that can be presented by the complaint itself, because such continued refusal is wrongful only if it continues to be actuated by a conspiracy which persists from the time the complaint is filed until the time of the trial. And that is the very point decided by this Frankfort case.

The Court: That is what Mr. Ackerson will have to prove.

Mr. Black: The issues aren't tendered. They can't be tendered by the Complaint in this case, because the Complaint speaks as of the date it was filed.

If there was a conspiracy after the Complaint was filed, that——

The Court: He says it is going on to the end of the world unless the court makes your client stop. Doesn't that [564] plead it is a continuing damage?

Mr. Black: Not at all. Not at all. If the con-

spiracy stopped the day after this Complaint was filed——

The Court: But he says it won't. He says, "It won't stop, Judge, until you and your equity powers issue injunction."

Mr. Black: He hasn't said anything of the kind. The only way he can say that is to say it in his Complaint, and his Complaint can't speak except as of the date it is filed.

The Court: It projects itself into the future. It says, "We have to have equity powers to bring this conspiracy to an end," doesn't it?

Mr. Black: If there is an injunction sought, of course, those issues are to be tried by the court in the absence of a jury. That is implicit in itself.

Damage issues resulting from occurrences after the filing of the complaint can't be covered in this action, except on a new set of issues tendered either by a supplemental complaint, with an answer filed, and a second trial, or if filed timely, up to the time of such a supplemental complaint before the trial, with the proper time for answer of the intendment of those issues.

The continued existence of the conspiracy after the date this Complaint was filed is not an issue in the law side of this trial. [565]

The Court: This is not the day for instructing the jury.

Mr. Black: This is the day for, I thought, ruling on the propriety of evidence.

The Court: One specific question which was placed, which asked what the reason, what the basis

was for particular estimates which he had already given. Since he had been allowed to state the estimate, without objection, I think he may state the reason for it.

You may submit, within reason, bearing in mind I just have two ears and 24 hours a day, any authority and I will read anything that you want to submit upon this question, and try to assimilate it before the day for instructing the jury arrives.

It is my present feeling that they may collect damages, if they make out their case, up to the time of the trial. You may file any authority which shows I am wrong.

I am not going to be bullheaded about it. I will back away from this feeling I have now if you show that I am wrong. But I don't think the Frankfort case does it.

Mr. Black: Well, we will do our best, your Honor, and we will see if we can find anything more in support of this doctrine.

In our submission the Frankfort case is precisely on all fours with this case. [566]

The Court: I think, Mr. Ackerson, it would have done us a lot of good to have had a pretrial hearing on this matter.

Mr. Ackerson: It would, your Honor. This question, however—and I am not criticizing—was not raised until the trial. I knew nothing about it until it was raised in court. I am sure Mr. Black was busy on other matters and perhaps that is the excuse there. But I think we could have simplified this a great deal by a pretrial.

Now in anticipation of perhaps another motion or so, I have prepared a brief here, just a short one. It is anticipatory but I think since Mr. Black has stated he is going to file the motions eventually, that I might as well file it and lodge it with the Court at this time and Mr. Black may have something to—I don't care. You might as well have it now, but I mean for the convenience of the Court I will ask permission to lodge it at this time. It has to do with the motions at the end of the case, your Honor.

The Court: Very well. Let us get on with the evidence.

Mr. Ackerson: Will you resume the stand, Mr. Lysfjord?

ELMER LYSFJORD

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Lysfjord, I think we covered yesterday a part [567] of these estimates of damage contained in Exhibit 39. Do you have that exhibit before you?

A. No, sir.

Mr. Ackerson: May I have that, Mr. Clerk?

(The exhibit referred to was passed to counsel.)

(Q. By Mr. Ackerson): I believe you have covered the first segment of page 1 on that, that is,

(Testimony of Elmer Lysfjord.)

the $22,000 figure. Will you just review that briefly, your basis for that figure of $22,120?

Mr. Black: Didn't we cover this, Mr. Ackerson?

Mr. Ackerson: I believe we covered that. Let's start down—and I think we covered adequately the figures $87,000, and so forth. And I think that we will ask permission to change the mechanical error there, the second figure of $66,503.40, which should be $75,050.40.

The next figure of $21,305.57 should be $12,758.57.

And the final figure on the recap page should be $6,379.28.

Do you find that correct, Mr. Doty?

Mr. Doty: Yes.

Q. (By Mr. Ackerson): Now turning to the second page will you, Mr. Lysfjord, and as to the figures relating to the San Bernardino expense there—do you have that? A. Yes, sir.

Q. ——will you just review those figures briefly, the [568] basis on which you estimate those figures?

Mr. Black: Weren't they covered yesterday too, Mr. Ackerson?

Mr. Ackerson: I am not sure. They will be very brief.

Mr. Doty: Yes, they were.

Mr. Ackerson: I believe they were.

Q. You stated that that consisted of $60 per month rent for a year, promotional expenses and advertising of $500, utilities and trucking expense of $700? A. Yes, sir.

Q. And that the figure $920 was one-half of that

(Testimony of Elmer Lysfjord.)

amount which was attributable to your personal loss? A. Yes, sir.

Q. And then the figure $23,080 should be diminished, should it not——

You don't mind this leading, Mr. Black?

——should be diminished by the difference between $10,632.78 and $6,379.28 attributable to the mechanical error on the first page?

A. I would say the procedure is correct. The exact amount of money I wouldn't at this time want to say.

Mr. Black: That is obviously the sum of the top figure on that page. It doesn't carry forward from anything.

Mr. Ackerson: We will ask permission to change the figures at the proper time. [569]

Q. Let's go on to this approximate cost of one carload of tile, and so forth. Do you have that, on the second page there, Mr. Lysfjord?

A. Yes, sir.

Q. Will you explain the basis on which you came to your conclusion with respect to that alleged damage of those figures?

Mr. Black: That is objected to as already asked and answered, if the court please.

The Court: Overruled.

Q. (By Mr. Ackerson): Make it as brief as possible, Mr. Lysfjord. I don't know whether it has been asked or not.

Mr. Black: On page 542 of the transcript.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): Will you make it just as brief as possible?

A. One carload of material cost approximately $6,000, and the average sales price of a carload of material is 30 cents a foot, making a total sale for a carload of material of about $18,000.

Q. You mean an installed price on the job?

A. Yes, sir.

Q. All right.

A. An installed price. And approximately 30 per cent of that $18,000 is the gross profit. 30 per cent of $18,000 [570] is $5,400.

Q. And that would constitute the gross profit, the expected gross profit, on a carload of tile?

A. That is true.

Q. Now how is the gross profit divided? Did you consider that in arriving at this figure?

A. I don't follow you.

Q. The gross profit, I believe you said, consisted of 30 per cent——

A. Oh, I see. The very basic costs of a job constitute the actual cost of it, the nails, the tile, stripping, labor, the taxes incurred, things like that.

Q. Let's see if we can illustrate that, if we can. Do we have a piece of chalk, Mr. Crier?

(Drawing on blackboard.) [571]

Q. Let's take a heading here and see if you can illustrate this, Mr. Lysfjord. We will entitle it "Gross Cost of a Job." Can we use that figure? "Gross Cost of a Carload of Tile Installed."

(Testimony of Elmer Lysfjord.)

Let's put over in this column the cost of the tile itself, which would be what, approximately?

A. Ten cents a square foot.

Q. What would a carload cost?

A. $6,000.00.

Q. There is $6,000.00 (indicating). Now, can you build that up to the installed price, from your experience and from your bidding operations and your knowledge? What do you add to that before it is installed?

A. The labor of actually installing that. The cost of trucking.

Q. All right. Labor and other materials. Trucking. A. Taxes.

Q. Taxes. A. Insurances.

Q. Insurance. Anything else? Do you add sales cost to it? A. No, sir.

Q. All right. Now, that constitutes your material and labor costs then, I take it?

A. That is right. [572]

Q. All right. Now, in bidding a job for the Downer Company or for yourself, did you add anything else to your bid, other than material, labor, insurance, trucking and taxes?

A. A certain amount of supervision. I am sorry. I left that out.

Q. Supervision. That comes on this side, right (indicating)? A. Right.

Q. All right. Now, do you add any item for profit, or anything else?

(Testimony of Elmer Lysfjord.)

A. To that total you would add a markup of 30 per cent.

Q. To all of this then you would mark up, add the total cost of all these factors and then you would add 30 per cent to that?

A. Approximately so, yes.

Q. All right. And what would that 30 per cent consist of?

A. As far as my company is concerned?

Q. Yes. Or as far as Downer Company. The basis you made these figures on.

A. Ten per cent of that generally goes to the salesman.

Q. All right. Ten per cent sales.

A. Ten per cent to the overhead factor.

Q. Overhead. [573]

A. Ten per cent profit to the company.

Q. Ten per cent profit. Now, when you were working with the Downer Company you participated only in the top figure of ten per cent, didn't you?

A. That is true.

Q. In your own business, would you have any further participation in those percentage figures?

A. I would have the additional ten per cent of the profit for the company.

Q. In other words, the basis here is based upon the fact that you would save the ten per cent sales cost for yourself and as an owner you would get the ten per cent profit?

Mr. Black: That is objected to as leading.

The Court: Sustained.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): Well, state the facts, Mr. Lysfjord.

A. As an owner of my own company I would get the ten per cent as a salesman commission, because I do the selling. I would also get ten per cent for the profit of the company, because I am an owner in the company.

Q. Very well. Then this figure here that we were talking about, under the line on page 2, that, as I understand you, is based on a combined cost of this 30 per cent and your labor and the rest of it, that $18,000.00 figure? A. Yes, sir. [574]

Q. That comprises all of this (indicating)?

A. That is true.

Q. What you have stated is merely as an owner of your own business you would expect to make 20 per cent of the $18,000.00 per car, is that right?

A. That is true.

Q. Now, the bottom part, the last three lines there are merely the results of that type of computation, is that correct? A. That is true.

Q. Now, you have stated——

Mr. Black: That is objected to, if the Court please. We are talking about the last three lines which involve completely unfounded assumptions that a car a month is going to be sold.

Mr. Ackerson: I am coming to that.

Mr. Black: That is what the last three lines are talking about.

Mr. Ackerson: Strike that question. I will accede to Mr. Black.

(Testimony of Elmer Lysfjord.)

Q. (By Mr. Ackerson): The next succeeding line there reading, "During the first year of business an average of one carload of tile per month——"

Mr. Black: That is objected to on the ground that is assuming a mere speculation as to something projected into [575] the future or the witness' guess or some other basis not supported by anything in the record.

Mr. Ackerson: I haven't asked the question yet.

The Court: What evidence supports it?

Mr. Ackerson: That is what I am trying to ask. The question was going to be, what is your basis for that statement?

Mr. Black: Let's get the witness to make the statement, not read it to him.

The Court: Finish the question then.

Q. (By Mr. Ackerson): What is the basis for your computation of the second line there, beginning with "During the first year of business," and so forth?

A. Because in some time past I had been selling a carload or more, generally more than that a month, for the R. W. Downer Company.

Q. What basis do you have for assuming that you could have done that for yourself? That is the purpose of your statement, isn't it?

A. I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else. I surely would work as hard

(Testimony of Elmer Lysfjord.)

or probably twice as hard for myself as for anybody else.

Q. Would you have had the same contacts for yourself as you had with the Downer [576] Company? A. I most certainly would.

Q. Now, that is the basis for the figure contained in that line. Can you go on and explain that, explain that basis in detail, how you arrived at that figure?

A. You mean the actual figures themselves or how I ascertained the use of a carload per month? Which is the question?

Q. Well, you have this figure of $64,800.00 there in the second line. I want to know the mathematics or your reasons, the basis, how you arrived at that figure.

A. Well, a carload per month would amount to a sale of $64,800.00. I broke that down a little further down here, that one-third of that $64,800.00 would be for an overhead factor of $21,600.00, a profit of $21,600.00 again being one-third of this amount.

And profit for myself—incidentially, the first profit would be with Mr. Waldron. We do split the amounts of the total. And the last line being a profit to myself of the same amount of money, being one-third of the anticipated profit for the year.

Q. That is based upon your assumption that you could have continued to sell a carload a month for yourself?

Mr. Black: I move to strike all of this testimony on the ground it is completely unsupported by any-

(Testimony of Elmer Lysfjord.)

thing but the witness' speculation on the [577] subject.

The Court: Denied.

Q. (By Mr. Ackerson): Is that correct?

A. That is correct, sir.

Q. Now, turning the page, Mr. Lysfjord, you have other computations there. Can you explain your basis, the foundation for those figures?

A. Previously I have explained the sum of $21,600.00. And to carry this forward I feel that in the second year of operation——

Mr. Black: We renew our objection to this line of testimony, if the Court please. It involves a gratuitous speculation to the future, that hasn't been borne out by anything in this record, to distinguish it from a mere guess or speculation or bit of wishful thinking on the part of the plaintiff.

The Court: Overruled. [578]

The Witness: I continued this group of figuring based on the amount of material that I had sold in the past, developing it up to the point of $21,600, and continuing on that growing basis that I feel that we have shown in the past to get a very moderate increase—I am of the opinion that I think I could do more than this, but using a very minimum of one-half a carload more in the second year, projecting this on in the dollar value to $32,400, and going into the third year along the same lines that we have been speaking of, to two carloads per month.

Mr. Black: That is objected to on the same grounds, if the Court please.

(Testimony of Elmer Lysfjord.)

The Court: Overruled.

The Witness: Bringing it to a total of $43,200. It is a continuing adding of these amounts to arrive at that $43,200, and adding these all together for the 3-year period it would amount to $97,200, and from our books, the general ledger that was in court yesterday or perhaps today too, there was an actual profit of $21,411.50.

Now subtracting the actual profit from the buildup that we have gone through here would show a total estimated loss due to the restraint of supply of $75,788.50.

Q. (By Mr. Ackerson): In other words, after arriving at the total, what you felt was the normal business, the business you should have [579] had, you deducted the actual profits made by your company during this 3-year period?

A. That is true.

Q. And that actual profit from your books was $21,411.50? A. That is true.

Q. You deducted that from your prior figures to arrive at the final figure of $75,788.50?

A. That is correct.

Q. Now I have only one question more, Mr. Lysfjord, and that relates to these exhibits from the Downer file, numbered 19, 20—and will you look at these as we go along—21, 22, 23, 24, 25, 26, 27, 28, and ask you from your experience with the Downer Company or with other companies there is any way in your mind or to your knowledge that the Downer Company could have submitted an

(Testimony of Elmer Lysfjord.)

actual bid or a bona fide bid other than tying it onto the other figures, the Shugart figures and the Coast figures and the Howard figures.

Mr. Black: That is objected to as calling for a conclusion of the witness.

Mr. Ackerson: He is an expert on this. If there is any explanation it can be rebutted.

The Court: Overruled.

The Witness: It would be impossible to do so. [580]

Q. (By Mr. Ackerson): In other words, those bids of the Downer Company had to be tied up with the others?

Mr. Black: Objected to as leading.

The Court: Sustained.

Mr. Ackerson: Very well. That is all.

You may cross-examine.

Mr. Black: May I have Plaintiffs' Exhibit No. 9?

(The exhibit referred to was passed to counsel.)

Cross-Examination

By Mr. Black:

Q. Mr. Lysfjord, do you recall giving a deposition in this case on September 19, 1952, continuing to October 7 and October 8, 1952?

A. I recall a deposition in that period. I don't recall if those are the exact dates.

Q. You did so testify to a deposition, however, at or about that time? A. Yes, sir.

Q. Now referring to the meeting which you have

(Testimony of Elmer Lysfjord.)

testified to occurring at your office on Atlantic Boulevard, you have testified, Mr. Lysfjord, that Mr. Thompson, Mr. Baymiller and Mr. Ragland were present, at which time you were told by the Flintkote people that they would no longer continue to sell you tile? Do you recall your testimony in connection [581] with that meeting at the trial?

A. I recall giving it.

Q. I now refer you to the deposition given earlier in this case on October 7, 1952, and to page 223 of that deposition, and I will ask you if you recall this testimony:

"Q. I see. Now, you claim, I believe, that your arrangement for a supply from Flintkote was terminated, or it did terminate?

"A. I claim that, yes.

"Q. When did that occur?

"A. To the best of my knowledge in April.

"Q. What were the circumstances?

"A. Mr. Thompson, Mr. Baymiller, and Mr. Ragland came to my office.

"Q. About when?

"A. About that date, I imagine. March, somewhere in March, and—I mean—I don't recall.

"Q. March or April?

"A. March or April, right.

"Q. And who else was there besides those gentlemen and you? A. Mr. Waldron.

"Q. Mr. Waldron. The five of you present?

"A. Right.

(Testimony of Elmer Lysfjord.)

"Q. And what was said by anybody [582] present?

"A. Mr. Thompson said that they were no longer going to sell us tile.

"Q. That is all that was said?

"A. There was a great deal more, but I can't recall it, because I became angry with the fact they weren't going to sell us tile.

"Q. Nobody asked him why?

"A. Certainly I asked him why.

"Q. What was said at that time?

"A. They felt they didn't want to sell us any more tile. It wasn't a great deal of explanation to it. He just said, 'We're not going to sell you tile, so what?' Of course, he didn't say, 'So what,' that's my inference at what he meant.

"Q. About how long were they there at that time in your office?

"A. A very short time, 10 minutes at the most.

"Q. Was Mr. Thompson the only one of the Flintkote group that said anything?

"A. Well, Mr. Baymiller said that he was very sorry it happened, and as I recall he said it was entirely out of their hands, they were told they couldn't sell tile to us.

"Q. Did he say who told him?

"A. No. He, as I recall, now—this is only [583] from memory—something along the lines of, 'You understand, we're only employees, we don't own the company.' Anything further than that I couldn't tell you.

(Testimony of Elmer Lysfjord.)

"Q. Let me say this, Mr. Lysfjord: I take it from your complaint that the termination of your supply of Flintkote, from Flintkote, your ability to get tile from Flintkote, is one of the important claims which you make as part of your lawsuit, and I am now asking you to give me, to the best of your recollection, everything that was said on this occasion of their apparently first informing you that you, aabeta company, would no longer be able to get tile from Flintkote.

"A. I have already answered that.

"Q. To the best of your ability you have given me everything that you can recall was said at that time by anybody present? A. That's correct.

"Q. All right. Did Mr. Waldron say anything that you can recall?

"A. I don't remember what Mr. Waldron said."

Then on page 320 of the deposition——

Mr. Ackerson: Mr. Black, are you going to ask a question about this or are you just reading the deposition? I mean, [584] the witness is here.

Mr. Black: Page 319, Mr. Ackerson and Mr. Lysfjord, line 15:

"A. I think I answered that question once before, and I have recalled, over the evening, a couple of more things that were said in this particular conversation, but probably the reason I didn't remember it, that I was so angry at the time that I don't think that I spoke very civil to them at that time. It was a very basic statement on their part. They came in and said very definitely, 'You are no

(Testimony of Elmer Lysfjord.)

longer going to have any tile supplied to you by the Flintkote Company.'

"Q. What were the additional things you recalled over the evening?

"A. Well, again, it's just searching my memory in the thing, but it's somewhat like, 'We decided we don't like the fact that you have an office on Atlantic.' I said, 'What's the matter with an office on Atlantic?' They said, 'Why couldn't you use your home?' I said, 'When I got the franchise from you at no time did you attempt to tell me how to run my business, now you're going to try to tell me how to run my business,' and the exact words I might remember in another few days, but at the time I was so angry—I'm an excitable [585] person, incidentally. I keep my temper to about 95 to 100 per cent of the time, but that last digit sometimes makes me pretty angry, and that particular thing did, because I was more or less aware of the development of this for some weeks, as your deposition will show, questioning along the line. As a matter of fact, as I recall, I think—I'm just saying I think—that I escorted Mr. Thompson out of the door and said, 'Get out of my office, I don't want to talk to you any more.' "

Do you recall giving that testimony?

A. Evidently. You just read it. [586]

Q. Did you escort Mr. Thompson to the door on that occasion and tell him to get out, you didn't want to talk to him any more?

(Testimony of Elmer Lysfjord.)

A. It is what I would have liked to have done, not what I did do.

Q. Why did you say you did do it then?

A. I have no reason to say.

Q. You were under oath at the time, weren't you?

A. Well, that is rather difficult for me to explain that to you. I think I was telling—I don't say I think—I was telling you what I felt like I was going to do.

Q. I beg your pardon?

A. I was telling what I wanted to do, not what I did do.

Q. Mr. Lysfjord, isn't it the fact that after you thought that question over that evening you decided that you ought to be angry about this thing and you decided that you would announce you were angry and therefore you threw him out of the office? Isn't that the plain fact?

A. Are you telling me what I thought?

Q. Yes.

A. How can you tell me what I thought?

Q. Because you just said you testified to something that didn't happen, because it was something you said you should have done, but you didn't. [587]

A. Those words intimate that perhaps. I am telling you that is what I wanted to do, not what I did do.

Q. You just told me you had testified you did do it, and it didn't happen——

A. Mr. Black, I am telling you exactly what—

(Testimony of Elmer Lysfjord.)

I am trying to the best of my knowledge to answer your question. You keep telling me things I didn't say. Why do you say that?

Q. It didn't happen, did it?

A. Escorting him out of the office?

Q. Yes. A. No, sir.

Q. Yet you gave that testimony, you gave the testimony, didn't you, at the deposition?

A. It evidently sounds like it, from what you read.

Q. You don't deny it, do you?

A. I don't deny what?

Q. You gave the testimony I have just read.

A. I was there, yes, sir.

Q. I now refer you, Mr. Lysfjord, to this University of California document, referring to the Santa Barbara College work, Plaintiff's Exhibit No. 9, and I ask you to look at that document.

A. (Witness complies.)

Q. Now, I believe you testified at the trial that you recall receiving that document at the Los Angeles office. [588] A. That is correct.

Q. Now, I refer you to your earlier deposition, page 72, line 22:

"Q. Now, did you or the aabeta company, during '51 or early '52, at the time the aabeta company was starting business, receive any other correspondence, letters or memoranda or documents from the Pioneer-Flintkote Company?

"A. That one you have right there.

(Testimony of Elmer Lysfjord.)

"Q. This says it is not an order. What do you call it?

"A. That is a request by the University of Southern California to have a bid offered to them—University of California—for a bid to do work for them, and that was sent to the Flintkote people. They in turn forwarded it to us as a contractor to bid on the job, and if we can do the job."

Then there is discussion off the record and then the document is identified as a document bearing date January 16, 1952.

That is the date of that document, is it not?

A. That is true.

Q. "* * * and the number above the date—it is either a '3' or '5' B, like Baker, 6639, and in the upper left-hand corner, University of California Purchasing [589] Department as addressor, and the addressee is the Pioneer-Flintkote Company.

"We will mark as the same defendant's exhibit, only No. 2 for identification."

That was referring to that very document, was it not, Mr. Lysfjord?

A. Well, you are reading the very same things that are on this document. I can't remember if it is the identical one.

Q. You don't recall any other document similar to that, do you, that has been in this case?

A. No, sir.

Q. Now, returning to page 76 of the deposition, the question appears:

"Q. Do you know at what office of the aabeta

(Testimony of Elmer Lysfjord.)

company, of the two you named, this Defendant's Exhibit 2 for identification was received?

"A. I don't know; I don't remember.

"Mr. Ackerson: I did not understand that question.

"The Witness: Which office that was received.

"Mr. Scully: He gave two addresses as their place of business. He said that previously the aabeta company received this letter and I asked which of the two addresses the letter was [590] received.

"Mr. Ackerson: Oh, I see.

"The Witness: And I don't remember."

Now, what has refreshed your recollection—pardon me. Did you give that testimony?

A. Again I just have to say evidently, you are reading a deposition. I can't remember the exact words following right along with you there.

Q. What has refreshed your recollection since the time you gave that deposition so you now remember receiving this at the Los Angeles office?

A. Well, I did receive it, which I said. And I have never ever received anything at the San Bernardino office, because I was never there at any time, other than a visit. So it could be only one other place and that is on Atlantic Avenue.

Q. At that time you didn't remember?

A. Evidently not.

Q. Therefore, you didn't have any recollection at that time as to how that document came to your

(Testimony of Elmer Lysfjord.)

hands, whether directly or whether you opened it yourself or what?

A. You evidently stated that just now, didn't you?

Q. Now, I am referring at the moment to these various documents, so-called takeoff sheets, Mr. Lysfjord.

I wish you would tell me again just what was your duty in connection with your work at the Downer Company that [591] required you to check and examine these documents.

A. My duty there was to bid work, to attempt to get this work for myself and the Downer Company.

The method of doing so was to take sheets of these or other sheets and compile figures or get figures. In this particular case the figures given to me, and bid these jobs and make an attempt to, as I said before, acquire these jobs for the Downer Company and myself.

Q. In what condition were those sheets given to you when you received them, blank or did they have an entry on them?

A. They were given to me exactly the way you see them, with the exception that some of these I had in my possession and Mr. Arnett asked me for them, and in my presence would write certain figures on these sheets and hand them back to me and say, "That is the figure you are going to bid."

Q. Did you prepare the bid in every case on those documents?

(Testimony of Elmer Lysfjord.)

A. On these documents (indicating)?

Q. Yes. A. I never did.

Q. I am frankly puzzled as to what your function was supposed to be with the documents.

A. To bid the jobs and try to get them for the Downer Company. [592]

Q. But, as I understand you, you received them in the same condition they are now in with the bid complete on them.

A. That is true, complete. You mean the figure complete?

Q. Yes. Then you tell me you did not prepare the bids, is that right?

A. Well, it all depends on what you mean by "prepare the bids." Did I make a takeoff on them? What are you referring to?

Q. I am trying to find out what it is they wanted you to do with those particular documents.

A. I just told you I bid them on the phone to general contractors and would try to obtain the job for myself and for the Downer Company.

Q. Did you in every instance telephone somebody and repeat the figure that appears on the written part of that bid on those documents?

A. Certain portions of these, yes. The other portion was handled by Mr. Waldron.

Q. You were expressly instructed, were you, by somebody in the company, to bid that precise figure in each instance? A. That is true.

Q. Why was that done by you rather than by somebody [593] else in the organization? What pur-

(Testimony of Elmer Lysfjord.)

pose did it serve to the company to have you do that? I am trying to find out what official function you had with respect to going through this operation.

A. Just my very job of bidding jobs at all times, these and others. These happen to be just a few of all the jobs that I did bid. I bid very many of them.

Q. But, as I understand your testimony, you were told what figure you had to bid?

A. That is true.

Q. You weren't given any discretion on that matter as to figuring costs or anything else?

A. None whatsoever.

Q. Was there any reason you can think of why they asked you to do that, rather than some girl in the office, to telephone or do it themselves, or what was the reason for asking you to do it?

A. Mostly because general contractors won't accept a bid from a girl. It has to be the salesman that calls on a general area. These examples are contractors—or jobs to be bid to contractors that were in my area, my territory; people that I was acquainted with. [594]

Q. And in every instance did Mr. Arnett or somebody in the company specifically ask you to call somebody and did this particular job, job by job? A. Yes, sir.

Q. Or were you just given the thing in a sort of a blanket instruction to take care of?

A. I don't just understand you.

(Testimony of Elmer Lysfjord.)

Q. Were you given a whole batch of these things at one time, for example, and told to work on them, or were you specifically told in each instance to bid the precise sum that appears on the documents?

A. In each instance.

Q. You don't have any idea who it was in the organization that obtained the information that appears on the documents as to the figure presumably to be bid by some other contractor?

A. Yes, sir, I do.

Q. What information do you have on that score?

A. Being present listening to conversations between Mr. Arnett and sundry people on the phone; also in the general office area where Mr. Griswold, at that time an estimator, and Mr. Tony Wellman, also an estimator, would contact these other people, get the information, write it on the back of the sheets, and the sheet was presented to me to bid in my presence. And at occasions I was called back by general contractors to [595] explain a certain figure. The reason that they would call me is that they were my general contractors. By that I mean the people in my area. And the estimator would have to find me somewhere in my territory and have me come back into the office with the take-off sheets to see if we could answer this contractor's inquiry.

Q. Would that be the general or the sub that would be calling you, or both?

A. The general. We were the subcontractors.

Q. Now this series of documents is confined, is it not, to public jobs?

(Testimony of Elmer Lysfjord.)

A. I would say so, yes.

Q. Without exception in those documents, that is true, is it?

A. In any case in these documents, yes, sir.

Q. And in your experience in that work, how many bids are required in order to bid a public job, do you know?

A. How many bids from whom?

Q. They have to have several bids, do they not?

A. No, sir.

Q. Are public jobs permitted on a single bid?

A. They are to the general. The general contractor bids the job. The subcontractor bids to the general. He can take one or 20 if he wants.

Q. Did you ever know of a public job that was based on [596] a single bid with no other bid?

A. Yes, sir.

Mr. Ackerson: I don't mean to interrupt, Mr. Black, but do you mean the bid of a general contractor or a subcontractor?

Mr. Black: I mean at the subcontractor level.

Q. Does that happen very often?

A. Oh, not too often, but it is quite possible.

Q. Isn't it the fact that occasionally when a contractor is employed or too busy to work on a job he will submit a purposely high bid to enable the successful contractor simply to say that there has been more than one bid? Have you ever heard of that being done?

A. It would be kind of a foolish gesture. I mean,

(Testimony of Elmer Lysfjord.)

all of us are real busy to try to keep up our work. I don't think that that would be so.

Q. Have you ever heard of what they call a courtesy bid?

A. Yes, sir, I have heard of that.

Q. That is the purpose of that, is it not, to give somebody an opportunity to say there has been more than one bid on this job and asks another person to put in a bid?

A. No, sir, I would say it was rather, that you take this job and I will take the next one.

Q. Well, now, in the Downer organization, do you know of your own knowledge what the motive was in doing this [597] operation that you are speaking of? A. Yes, sir.

Q. How do you know that?

A. Conversations that I was present at, the general experience that I have had in this field over past years to know exactly what the idea of it was.

Q. Are you able to state that in every instance the Downer Company was not simply filing what they might call a courtesy bid as an accommodation to another contractor to enable him to have a low bid where the Downer Company didn't intend to do the work at all?

A. In every instance? Referring to what?

Q. No, I am talking about the take-off sheets. Maybe I didn't make my question clear. I will repeat it.

Are you able to state from your own knowledge

(Testimony of Elmer Lysfjord.)

that there are not some instances among these documents wherein the Downer Company simply was trying to accommodate another contractor in a situation where they couldn't have bid on the job anyway because they were too busy, by putting in a bid that was higher?

A. I most certainly do, because these take-offs represent an area that I was working in and it was up to me to decide whether we wanted to bid the job or not.

Q. You had no discretion in the matter on these jobs, as I understand it. [598]

A. The very fact that I had to bid a certain figure, yes, sir, but whether I wanted to bid the job or not was up to me.

Q. You knew you wouldn't get the job, didn't you, in each case you were instructed to bid a figure that was higher?

A. At a later date I did but not to begin with. I wasn't aware of the fact when they first started, as to what the reason was. But I surely found out soon enough because it affected my income.

Q. How long did this sort of thing keep up?

A. What sort of thing?

Q. This practice of, as you testified, passing the jobs around to various subcontractors?

A. At least until the time I left the Downer Company.

Q. Do you know of anything after that date?

A. Well, I have just learned a little lesson in court, that you can't surmise anything. I was well

(Testimony of Elmer Lysfjord.)

aware of it from conversations, if that is what you want me to say, but if you want me to say definitely, no, sir.

Q. I call your attention, Mr. Lysfjord, to your deposition at page 259, line 23, where you were asked this question:

"Q. Do you claim that following that period of price drop"—(talking about a period of lower prices)—"that it went up again?

"A. Never went up. [599]

"Q. Never went up? A. No.

"Q. Is it today low?

"A. Very low; very low.

"Q. Based on your knowledge of the local industry in acoustical tile, and the competition in the field around here in that business, what do you attribute that to, that is, I mean, the continued low level of the price? Competition?

"A. My opinion?

"Q. Yes.

"A. My opinion is the fact they are no longer getting together on the jobs."

Do you remember giving that testimony?

I believe so; yes, sir.

Q. What was the basis of that statement?

A. Well, the amount of money that a particular job was going for at that time.

Q. Now, following the termination of your relations with The Flintkote Company, Mr. Lysfjord, how busy were you immediately following that date? A. What do you mean by busy?

(Testimony of Elmer Lysfjord.)

Q. In your activity as an acoustical tile contractor.

A. Comparing it to what, though? I have got to compare it with something. Busy in my mind and yours might be [600] two different things.

Q. Were you operating to the full extent of your capacity immediately following your termination, let's say?

A. Only to the extent of the use of the Flintkote tile that we had.

Q. How long did it take you to use that tile up?

A. I hesitate to guess exactly how long.

Q. We learned yesterday it wasn't used up by the first six months of 1952.

A. Well, then, you have answered the question.

Q. How long after you had—by that time you had installed only $4,000 worth of tile or thereabouts—how long, if you recall, did it take you to use up the rest of the Flintkote tile?

A. I wouldn't venture a guess. You can look into the files—they are there—and look at it.

Q. You don't have any opinion on that at all or any recollection of it?

A. I have no opinion at this time.

Q. I call your attention to the deposition, Mr. Lysfjord, at page 80, line 24:

"Q. At that time, May or June of '52, did you say you had more business than you could handle?

"A. May or June?

"Q. Of '52? [601] A. That's right.

"Q. And how long did that condition in aabeta

(Testimony of Elmer Lysfjord.)

exist, that you had more business than you could handle?

"A. Just that long. You probably realize we had to get trucks, scaffolding, and men to do the job and to perform service that we were supposed to do. At that time we didn't have the men or the equipment to be able to perform at the time we had the tile.

"Q. That was May or June of '52?

"A. That's right, right about then.

"Q. Then, I take it, you had not completed aabeta's organization until about that time; is that right?

"A. That's right. The company actually did not go into operation or even install a job for three months after the first of the year, or thereabouts.

"Q. After the first of 1952?

"A. That's right."

Do you recall giving that testimony?

A. Yes, sir. [602]

Q. Does that refresh your recollection somewhat as to how soon it was you were able to actually use the tile you had on hand at the time of the termination?

A. Mr. Black, if you want to find out exactly, I can go to my records. If you want me to guess, I just won't do it, or I can't do it.

Q. If you tell me you can't do it——

A. I can't do it.

Q. That is rather a different thing from telling me you won't do it. The court has a right to protect

(Testimony of Elmer Lysfjord.)

you from any improper question. I don't want to propose to you——

A. I meant I didn't want to guess. Let's put it that way.

Q. When you first talked to Mr. Ragland, Mr. Lysfjord, in connection with the establishment of a line of tile, as I understand it, his first statement, in effect, was that he would check with his people and would find out what the situation was?

A. Yes.

Q. And didn't he tell you in one of the earlier statements, when it was still in an indefinite state, as to what your position would be, in one of your conversations that there was no opportunity to get into the Los Angeles area at all?

A. No, sir. [603]

Q. Do you recall his suggesting that there might be an opportunity in Phoenix or Albuquerque or Denver? A. Yes, sir, I recall that.

Q. What was the occasion then, if you know, for his suggesting places that far away? Did he give any explanation of that?

A. I don't remember he did.

Q. You wouldn't have been interested in trying to cover Denver and Los Angeles at the same time, would you?

A. I had no intentions of working anywhere than in Los Angeles.

Q. Along the same line, at the first Manhattan Supper Club luncheon when Mr. Baymiller and Mr. Ragland and yourself were present, do you not re-

(Testimony of Elmer Lysfjord.)

call Mr. Baymiller at that time stating flatly that the company was already adequately represented in the Los Angeles area and there was no opportunity available here?

A. If he had said that, there would have been no reason for any future meetings.

Q. I am asking you a question. Give me an answer of yes or no to the question. A. No.

Q. Do you recall at the second Manhattan Supper Club meeting that Mr. Thompson said, "There will be an opportunity for you in San Bernardino and Riverside, but the Los Angeles [604] territory will not be available to you"? A. No, sir.

Q. Do you recall his stating on that occasion, in answer to your inquiry, whether you wouldn't be permitted to take jobs in Los Angeles, with respect to certain contractors that you felt you could get business from, when nobody else could, do you recall Mr. Thompson stating, in answer to that question, "Well, any such matters will have to be considered as they come up, on their merits"?

A. No, sir.

Mr. Ackerson: That question is complex. I mean you have asked two questions, Mr. Black. Do you want a negative answer to both of them?

Mr. Black: I think the witness understood me. I wanted to give the full background so he would understand what I was talking about.

Q. (By Mr. Black): Do you recall any such statement from Mr. Thompson? A. No, sir.

Q. Do you recall at the meeting later, when Mr.

(Testimony of Elmer Lysfjord.)

Harkins interviewed you and Mr. Waldron, that Mr. Harkins put the question to you, "Now, are you people sure that you will have enough business in the San Bernardino-Riverside area to keep you going"? A. No, sir, I do not. [605]

Q. Mr. Lysfjord, there has been some testimony in the case about a warehouse down somewhere near the Los Angeles River. Did you have anything to do with the acquisition of such a place?

A. I believe I did, yes, sir.

Q. When was that acquired?

A. In the early part of our operation.

Q. Was it acquired by the aabeta co.?

A. By the aabeta co., yes, sir.

Q. Did you do any business there?

A. We attempted, rather, it was our intention to use that as a supplementary storage house for our anticipated car from Pioneer-Flintkote, which, incidentally, we never received.

Q. Now, I invite your attention to your deposition given September, 1952, to page 121, line 19:

"Q. What places of business did the aabeta company have at any time during the year 1952?

"A. 7302 South Atlantic, Bell.

"Q. When was that opened?

"A. It was in February.

"Q. Of '52? A. Yes.

"Q. Is that under lease?

"A. That's right. [606]

"Q. Do you have that lease, or a copy of it?

(Testimony of Elmer Lysfjord.)

"A. I did have, but don't have it with me. I evidently didn't bring it with me."

Then going on, talking about the lease, which at the moment we are not interested in:

"Q. Give me all the addresses of all the places of business that the aabeta company had in 1952.

"A. You have 7302—you have the 7302 Atlantic address. 901 North Waterman, San Bernardino.

"Q. Any others? A. That is all.

"Q. Was the Waterman in San Bernardino leased as well? A. That's right."

Do you recall giving that testimony?

A. Yes, sir.

Q. Why wasn't this warehouse on the river mentioned at that time, if you know?

A. I was referring to our two separate addresses of Los Angeles and in San Bernardino. I didn't think there was any particular distinction of how many places that we stored material. I didn't understand that to be the question.

Q. You didn't understand that to be a [607] place of business?

A. I didn't understand that as being an answer to the question that was asked.

The Court: We will recess.

(Short recess taken.) [608]

The Court: Proceed.

Q. (By Mr. Black): Mr. Lysfjord, at the time you were negotiating for the Flintkote line and the time that you started establishing yourselves as

(Testimony of Elmer Lysfjord.)

Flintkote dealers, did The Flintkote Company have a complete line of acoustical tile?

A. What do you mean by a complete line?

Q. Well, isn't it the fact that in certain buildings you have to have a non-combustible tile in order to comply with specifications?

A. Occasionally.

Q. Did The Flintkote Company have a non-combustible tile? A. Not to my knowledge.

Q. During that period they didn't?

A. Not to my knowledge.

Q. So that if you had work of that kind to do you would have to go to another supplier in any event to get that tile, would you not?

A. We wouldn't have work like that because I wouldn't bid on a job with that material.

Q. Did you ever install any non-combustible tile in your operations with the aabeta company?

A. Up until what time?

Q. At any time. [609]

A. At any time? Yes, sir, I did.

Q. Where did you acquire that tile?

A. At various places.

Q. Now in your discussions with the Flintkote people, do you recall at any time any mention made that you would or would not carry other lines of tile than the Flintkote tile?

A. Whether or not we would or would not?

Q. Yes. Do you recall that subject coming up in discussing your relations with any of the Flintkote people, the subject of whether you would handle

(Testimony of Elmer Lysfjord.)

lines of tile other than Flintkote or Flintkote entirely?

A. We were trying very hard just to get one, we weren't worrying about others.

Q. My question was, Mr. Lysfjord—if you don't understand me, don't hesitate to ask me—do you recall any discussions at which you were present with the Flintkote people at which the subject of whether you would handle Flintkote tile exclusively or other people's tile in addition to Flintkote was mentioned?

A. No, sir, I don't recall anything like that.

Q. There was no discussion at any time that you know of? A. No, sir.

Q. Nothing specifically apparently was said by the Flintkote people that, we are glad you are the only dealer handling nothing but Flintkote tile, or something of that sort? [610]

A. Now you brought something back to my mind, that they did say something like that. But I wasn't connecting it up with the question that you asked.

Q. When was that said?

A. At one of those meetings.

Q. How do you happen to remember that?

A. You just told me and I recalled.

Q. Did you answer yes because you thought it would benefit you if I just told you, or do you really remember it?

A. I really remember it.

The Court. Just what do you remember?

The Witness: That Mr. Thompson mentioned that they were happy to have an outlet that was

(Testimony of Elmer Lysfjord.)

handling exclusively—of course I don't recall if they used the word "exclusively"—but at least the only line of Flintkote tile. [611]

Q. Well now, let me call your attention to your deposition, Mr. Lysfjord, given in September, page 60, line 20:

"Q. Was anything at all mentioned about an exclusive or nonexclusive operation of yours as to Flintkote? A. No.

"Q. In any of these conversations did you discuss or did they discuss whether or not your new business would possibly handle other makes of acoustical tile at the same time, along with Flintkote?

"A. I don't remember anything like that being mentioned."

Did you give that answer?

A. Probably so, but I would have remembered it if it had been mentioned like you just did now.

Q. That was back in September of '52. Are you able to explain why the fact I mentioned it to you suddenly brought it to mind and you couldn't remember it at that early date?

A. Mr. Black, how am I going to explain my memory? I don't understand it myself. I either remember it or I don't.

Q. Where was your home at the time that you were [612] working for the Downer Company toward the end of your relationship with the Downer Company?

(Testimony of Elmer Lysfjord.)

A. Well, it was either in Lynwood or in Huntington Park.

Q. Do you recall?

A. It was in Huntington Park. I had moved very recently at that particular time.

Q. Are you able to fix that date, when you moved? A. When I moved?

Q. Yes.

A. Approximately the end of '50. I would say somewhere in through there, '51.

Q. That was to Huntington Park?

A. I can check it if you want to know exactly.

Q. If you know. I am not trying to pin you down to an exact date, but do you recall where you were living at the time that you were contemplating going to Flintkote and terminating with Downer?

A. It is my recollection it is Huntington Park.

Q. How far from the Downer plant is that address, approximately?

A. Ten, fifteen miles.

Q. How often did you go to the Downer office when you were working for Downer, during that period, just on an average? [613]

A. Probably a couple of times a week.

Q. No oftener than that?

A. It would vary. I might be in there every day of the week. I might not be in there for a whole week, depending on the reasons I had to go in there.

Q. Now, your position with Downer was that of a salesman on commissions?

A. That is true.

(Testimony of Elmer Lysfjord.)

Q. And you regarded yourself as being employed by the Downer Company? A. No, sir.

Q. Well, what relationship did you think you had with the Downer Company?

A. That I acquired work and that we would do the job together, of which I was to share a certain amount on the profits.

Q. The income tax returns that you filed show that they withheld income from you as an employee, did they not? A. I imagine it does.

Q. You had no other source of income during the year 1951 than your commissions from Downer?

A. No, sir.

Q. Did you consider yourself free to go and take a job for Coast or for Hoppe or for any other company during this period, if you saw fit, at your pleasure at any time? [614]

A. I won't say that I would take a job and give it to any one of the other companies, because it wouldn't be to my benefit, but if I so chose I probably could.

Q. You felt no obligation at all to give all your work to the Downer Company?

A. I felt an obligation to make money for myself.

Q. For yourself only?

A. That is the only reason I got the work; not to benefit the Downer Company. [615]

Q. What date, if you remember, was it that you terminated your relations with the Downer people?

(Testimony of Elmer Lysfjord.)

A. You mean actually left working for them at all?

Q. Yes.

A. Or when I told them I was going to leave? Which are you referring to?

Q. I am referring to the actual termination.

A. I figure the end of January. However, there is no very definite date of severance in the sales business. You would have to follow up some of the jobs that you have already contacted in the past and perform the service that you originally started to do. You just can't chop a day off. I mean, I don't work from 8:00 to 4:30 in the sense that after 4:30 you no longer work for them.

Q. What did you do day by day in your work with the Downer Company? What was the nature of your work generally?

A. I would call on general contractors and take off plans that they may have and compute costs and big work, attempt to follow that work to see if I were successful or able to convince the people that they ought to let me do the work.

Q. Speaking generally, did you work every day, every working day in the week?

A. Oh, I probably did some work every day.

Q. And was that true right up to the time that you left their employ? [616]

A. Are you referring to my working in connection with the Downer Company?

Q. Yes. A. Yes, sir, I did.

(Testimony of Elmer Lysfjord.)

Q. So it was substantially all of your business time that was devoted to that job, wasn't it?

A. Not necessarily so.

Q. What would be the exceptions? What would you be doing on times when you were not devoting all your business time to the Downer Company?

A. At one time I was learning how to be an estimator for the general contracting.

Q. And what period did that take?

A. Off and on through all the period that I was there.

Q. Would that be true of the period during the negotiations with Flintkote?

A. Possibly so.

Q. Are you able to state definitely one way or the other?

A. No, I couldn't say definitely.

Q. Did you tell the Downer people that you were making a connection with Flintkote?

A. No, sir.

Q. What did you tell them when you left their relationship? [617]

A. I told them I was going to leave, I didn't want to be associated with them any more.

Q. Did you explain why?

A. I don't believe I did to begin with. However, I was asked many questions of it.

Q. Did you tell them you were going to go into business for yourself?

A. Eventually I did; yes, after answering the questions that were put to me.

(Testimony of Elmer Lysfjord.)

Q. What was said by him?

A. By whom?

Q. By Mr. Arnett. I presume you talked to Mr. Arnett? A. I talked to many people there.

Q. I mean to say, he was in charge of the office, wasn't he?

A. Well, there were two people in charge, Mr. Roy Downer and Mr. Arnett. If you are asking a question whether I talked to Mr. Arnett or not, I did, yes. [618]

Q. With whom did you have your discussion about going into business by yourself?

A. Both Mr. Arnett and Mr. Roy Downer.

Q. What did you say to them and what did they say to you?

A. It was mostly what they said to me. They were trying to discourage me from going into business. They said it was a very difficult thing, that I had a good job there and that they offered me a guarantee of $15,000 a year to stay with them, and a larger territory.

Q. Well, now, you think it was January that you actually left the Downer people?

A. I think it was somewhere around January.

Q. I refer to your deposition at page 64, line 14:

"Q. You told them when you left. When did you leave the Downer Company, about June of 19—— A. Oh, no. February.

Q. February. About the end of February, you said, of 1952, I think.

"A. Something like that.

(Testimony of Elmer Lysfjord.)

"Q. What did you say about that subject of having contacted or made arrangements with Flintkote, that is, in the Downer Company, who did you talk to and what did you say?

"A. I just said I was leaving. [619]

"Q. Did you say anything about Flintkote?

"A. No.

"Q. Who did you talk to?

"A. Arnett, the sales manager.

"Q. How soon after you told him you were leaving did you actually leave?

"A. At the end of the month.

"Q. The end of February?

"A. I think it was February, the end of February I left."

Does that refresh your recollection?

A. To what? As to when I left?

Q. As to the date you left.

A. I still believe it was the end of January.

Q. And that you were probably wrong when you said the end of February in this deposition? What makes you think that?

A. Probably searching my mind of it.

Q. You continued to be pretty busy on Downer's and your own behalf until you quit, didn't you?

A. I would say so.

Q. And I think you testified, either at the trial or the deposition, I don't know which, that you turned in a substantial amount of orders to the Downer Company the very day you left, do you recall that? [620]

(Testimony of Elmer Lysfjord.)

A. That is true.

Q. So that you were busy getting those orders during that period, I take it? A. Yes.

Q. And it took a lot of doing to get them?

A. That is a matter of opinion. What are you talking about doing? Are you talking about hours of a day or the amount of effort placed in it, or what are you referring to?

Q. You worked hard and diligently to get those orders, didn't you?

A. I consider myself working hard and diligently all the time.

Q. All right. Now, Mr. Lysfjord, in connection with this list of invoices which are summarized under Exhibit 40 for identification, and the tabulation which accompanied them, I am going to ask you, if you will, to take the adding machine tape that is attached or clipped to these sheets, and I will ask you to verify the figures of the footings of the pages that are on this list while I read them with Mr. Ackerson so he can check those amounts, and if there is any error there please correct me. I just want to be sure that those footings are all on that adding machine tape.

The first page is $10,163.61. Does that check?

A. Yes, sir.

Q. The next page is $13,994.06. [621]

A. Yes, sir.

Q. And the next page is $10,877.21?

A. Yes, sir. [622]

Q. The next page is $10,979.05?

(Testimony of Elmer Lysfjord.)

A. Yes, sir.

Q. The next page is $9,315.93?

A. Yes, sir.

Q. The next, $12,026.84? A. Yes, sir.

Q. The next, $13,448.09? A. Yes, sir.

Q. And the last, $7,004.18? A. Yes, sir.

Q. And the total of that, I believe, is $87,808.97?

A. That is what it says, but I can add up differently right now.

Q. What did you say?

A. That is what it says, but I can add up differently right now.

Q. Can you? If you can, let me know. I think it is correct.

A. You are right. I was adding it as I went along, was all.

Q. I don't think the adding machine hit the wrong key on that one, Mr. Lysfjord.

Mr. Ackerson: It did once before, Mr. Black.

Q. (By Mr. Black): I just wanted to verify that is the total of the footings of all these summaries. [623]

Now, I think you told me, Mr. Lysfjord, that every item, other than acoustical tile, has been eliminated from this calculation, to arrive at that total.

A. I said the young lady was instructed to do so. And I answered several questions.

Now, what is actually in there was in the hands of Mr. Hamiel and not me. I kept myself away from any part of that.

Q. So you don't know then, of your own knowl-

(Testimony of Elmer Lysfjord.)

edge, whether it does, in fact, include items other than acoustical tile?

A. I believe Mr. Hamiel mentioned also decorative tile.

Q. Well, did Flintkote handle decorative tile?

A. Yes, sir.

Q. What lines? A. Flintkote tile.

Q. Was that in your contemplation when you were contemplating these relations that you would take decorative tile as well as the ordinary acoustical tile? A. Why, yes, sir.

Q. I show you one page of this. I am not going through the whole thing, but I want to ask you about a few of these items on page 6 of this summary.

We find here an item and it says, "Old mold." Do you know what that is?

A. That is a molding fiberboard molding, but that is [624] only $2.35.

Q. I know it is. I am just asking what the item is. What is a "Wood starter strip"?

A. That is a piece of material used with acoustical tile, to facilitate in its operation.

Q. And this item "Fiberlite"?

A. That is "Fibertile."

Q. "Fibertile." Is that an acoustical tile?

A. That is what is referred to as decorative tile.

Q. Is that true of this item of $87.00—or $33.00. Are these all decorative tiles, fibertile?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. What is the item marked "Birch." B-i-r-c-h?

A. I don't know. I would have to check the invoice to see what it is.

Q. Is that a plywood?

A. I wouldn't know.

Q. Would it be an acoustical tile marked "Birch"? A. I assume not.

Q. What is an item marked "AA int," i-n-t?

A. I do not know.

Q. There are three such items? A. Yes.

Q. And there are two more items marked "Birch."

A. That is not "Birch"—this one is (indicating). [625]

Q. Not these two? A. One is.

Q. One says B-r-d-h, isn't that the same as the next item? A. Possibly.

Q. What is "int AD"? Do you know what that is? A. No, sir.

Q. What is "Lusterlite"?

A. Decorative tile.

Q. Is that similar to anything that Flintkote handled? A. Yes, sir.

Q. What is "Building board" here, $693.44?

A. That is a fibertile of a sort, a larger size. It is a fiber material.

Q. Is that anything like Flintkote carries?

A. Yes, sir.

Q. What is the size of that?

A. Four foot by eight foot.

Q. There are some of these items, anyway, which

(Testimony of Elmer Lysfjord.)

makes it rather apparent, at least a few items on this list are not acoustical tile, am I right?

A. I wouldn't say that. I would have to find out what they are before I could say that.

Q. Anyway, apparently you don't know whether this is all acoustical tile or not all acoustical tile, of your own [626] knowledge, is that right?

A. That is correct.

Q. Now, on what do you base your statement that you thought you could sell a car a month during the first year of your operations?

A. Based on the amount of material I had sold in the past.

Q. In what connection, with Downer Company?

A. When I was associated with Downer Company, yes, sir.

Q. What induced you to think that you could sell more than that after the first year of your operations?

A. Well, mostly because of increased amount of money to be able to handle more tile.

Q. Is there anything that enabled you to fix, based on any experience of your own, how much more tile you would be able to sell?

A. Surely, all the time I have been selling; each year I have increased my sales quite a bit.

Q. In that ratio?

A. I would say probably so.

Q. Did you sell 50 per cent more tile in 1950 than in 1949?

A. As a matter of fact, I did.

(Testimony of Elmer Lysfjord.)

Q. Did you sell 50 per cent more than that in the following year? [627]

A. You mean the preceding year?

Q. No.

A. We are going backwards, aren't we now?

Q. How much tile did you actually sell during the first year of your operations in the aabeta co.?

A. Dollarwise?

Q. Yes.

A. I can't recall. Our books will show it.

Q. Your books will show that?

A. Yes, sir.

Q. It didn't amount to a car a month, did it?

A. No, sir.

Q. Yet you had somewhat better than a car, about a car and a half of Flintkote tile to sell at the very outset, didn't you?

A. That is the amount of tile we ordered, or, rather, that was delivered to us.

Q. It was a good many months before that tile was used up, wasn't it?

A. There is a very good reason for that, if that is true. Now, I don't know if it took us that long. You are stating that. The reason for that probably —not probably, but actually is we had to save that material to finish the jobs already sold and in our files, and not allowing us to go out and get any new business. [628]

Q. Do you know that?

A. Do I know that?

Q. Yes. A. That that is the reason?

(Testimony of Elmer Lysfjord.)

Q. Yes. A. Yes, sir.

Q. The tile that you were supplied by The Flintkote Company, to fill orders which were firm contracts at the time of the termination, was supplied to you in addition to the car you had already ordered, was it not? A. Yes, sir. [629]

Q. You weren't required to go back and apply that tile to the new contracts?

A. I don't follow you.

Q. Well, I mean to say when you went to the Flintkote Company with contracts and requested them to supply tile to fill those contracts they stood on their own footing, didn't they? You just ordered the tile needed for those jobs.

A. That is true.

Q. And they didn't deduct from that the fact that you had had a car before?

A. No, sir, they did not. However, we have bids that wouldn't come into our office for probably two or three months after they are originally made, and those are the ones we have to protect.

Q. I understand that.

A. We are protecting our word.

Q. They didn't deduct, though, from these new contracts what they had already given to you before? A. No.

Q. What was the financial position of the Downer Company generally when you were with them, the last months? A. I have no idea.

Q. Were they adequately financed, as far as you

(Testimony of Elmer Lysfjord.)

could tell? Did you get the tile, in other words, without any difficulty when you got the jobs? [630]

A. You are referring to the R. W. Downer Company?

Q. Yes.

A. Why I never concerned myself with whether they were financially stable or not.

Q. You had no trouble on that score? I mean, there was no difficulty about credit?

A. In purchasing materials?

Q. Yes.

A. I had nothing whatever to do with purchasing of materials, Mr. Black.

Q. You did have, however, the matter of supplying tile to the jobs, did you not?

A. I brought in the orders for the work. The delegation of where the material was to be bought and when it was to be done and that was in somebody else's hands, not mine. I wouldn't have the faintest idea how they ran their business as far as finances are concerned, whether they had to get loans or if they paid on time or they were 40 days late. I have no knowledge whatsoever.

Q. Did you ever experience any delays in getting tile delivered to the jobs when you were at the Downer Company, based on inability of the Downer Company to make arrangements for it?

A. Quite often, but I don't think it was financially. I think it was the fact that they didn't get around to do the [631] job. It was in the construction department end of it.

(Testimony of Elmer Lysfjord.)

Q. So far as you know, there were no difficulties with the Downer Company with respect to credit?

A. No, sir. I did not know anything of that at all.

Mr. Black: I want to confer with my associate one moment.

(Conference between counsel.)

Mr. Black: I think that is all, Mr. Lysfjord.

Redirect Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, at the time you had your deposition taken back in September, 1952, had you ever testified in a deposition or otherwise before?

A. No, sir.

Q. It was a new experience for you, wasn't it?

A. Quite new.

Q. Mr. Black asked you if you followed these figures on the take-off sheets in submitting a bid, and I am going to ask you if you ever violated your instructions along that line. A. Yes, sir.

Q. Can you tell us about that?

A. Well, about two or three different times I was called into the office of Mr. Roy Downer with Mr. Arnett present and stating that I would have to cease bidding these jobs on my own and follow the instructions that I have been [632] given by the company, or we wouldn't be associated any longer.

Q. What did you say, if anything?

A. I said that I would attempt to get work when-

(Testimony of Elmer Lysfjord.)

ever and wherever I could, and if they felt that I couldn't be a part of their organization that all they would have to do is say so and then I would gladly leave and go somewhere else. [633]

Q. Now, Mr. Black referred to this page as 6 forming part of the Plaintiffs' Exhibit 40 for identification.

I just want to see what these items were that he covered, that he referred to. I think I took notes on it, Mr. Lysfjord.

It is on page 6. Will you turn to page 6?

(Witness complies.)

Q. You recall the first item that was called to your attention? Was it wood strips, or something of that sort, or was there an item ahead of that?

Mr. Black: "Old mold" I think was the first one.

Mr. Ackerson: A mold?

Mr. Black: "Old mold."

Mr. Doty: "Old mold."

Q. (By Mr. Ackerson): Do you find it, page 6?

A. Yes, there is "old mold."

Q. What was the amount of that item?

A. $2.35.

Q. What is the amount of this "birch" item?

A. $32.77.

Q. Is there an "AA int"? I understood you were asked about that.

A. Oh, yes, here (indicating); $21.60.

Q. I believe you stated that building board item of—what was that, five or six hundred dollars?

(Testimony of Elmer Lysfjord.)

A. $693.00. [634]

Q. That was a product comparable to a product manufactured by Flintkote?

A. That is true.

Q. Mr. Black commenced reading originally in this deposition, I believe, at page 72, down near the bottom of the page.

Now, the second line on the same page, Mr. Scully said:

"When did you receive the copy of this letter, of which this is a photostat?

"The next day from that date" is your answer.

"Q. About the 18th of January, 1952.

"A. That's right."

Mr. Black: That is the wrong thing, Mr. Ackerson.

Mr. Ackerson: I don't think so, Mr. Black.

Mr. Black: Yes. That is the Louie Downer letter.

Mr. Ackerson: Oh, I beg your pardon. I was trying to clear things up. That was the letter from Louie Downer relating to purchase?

Mr. Black: Yes. The San Bernardino territory letter.

Mr. Ackerson: Yes.

Q. (By Mr. Ackerson): Mr. Black called your attention to another statement in your deposition but I think you can recall it without returning to the page.

Mr. Ackerson: I am referring to page 259, Mr. Black.

Q. (By Mr. Ackerson): In which you stated

(Testimony of Elmer Lysfjord.)

that as of [635] the date of that deposition you didn't think this price-fixing and bid-allocation business was going on among the contractors. Do you recall that? A. Yes, sir.

Q. Will you explain, if you can, the basis for that thought or opinion expressed at that time?

A. Well, in bidding our own work, trying to get jobs, the over-all picture at that particular time of the markup that you could put on a job and still be able to get it was so low that I was quite sure there wouldn't be much sense in getting together and having low prices.

It would be the opposite effect they were after.

Q. In other words, you concluded from your experience in sampling the market by bidding that the prices were too low to have had the scheme still operating? A. That is right.

Q. This was in your deposition in September, 1952, do you recall that? A. Yes, sir.

Q. Now, have you had occasion to revise that opinion with respect to a later date, as to whether or not the prices are higher or lower than they were in September of '52?

A. The smaller jobs are generally about the same.

Mr. Black: Pardon me. What period of time does this relate to? [636]

Mr. Ackerson: Since 1952, September.

Mr. Black: Let's get the period fixed a little more definitely.

(Testimony of Elmer Lysfjord.)

Mr. Ackerson: Very well.

Mr. Black: He said the prices "are." [637]

Q. (By Mr. Ackerson): Can you give us any facts, Mr. Lysfjord, as to the time when you observed these prices changing, if they did change, the time of the change, that is, with respect to September, 1952?

A. Well, a matter of probably four or five, six months later. It is hard to say exactly a particular date because you don't pick up a trend overnight. It is a matter of searching in through the amounts, the mark-up that you can have over a period of time. And the smaller jobs, up to $8000 or $10,000, were very, very competitive, and from that point on up in price, the larger jobs, upwards of $50,000, $60,000 and $100,000, the jobs were very, very high.

Q. Now let me ask you this, Mr. Lysfjord: When you submit a bid on a job to subcontract the acoustical tile and after that bid is awarded to an acoustical tile contractor, do you as a bidder, an unsuccessful bidder, have a right to see the bid of the successful bidder? A. Yes, sir.

Q. Is that the manner in which you would make your determination as to whether the price was high or low? A. That is true.

Q. In other words, it was by checking the bids after the job was let? A. That is true. [638]

Q. Can you name any specific instance that would substantiate your statement you have just made concerning the variance in price after September, 1952?

(Testimony of Elmer Lysfjord.)

A. I remember a school job called the Airport Junior High School, I believe. It was a job upwards of $60,000 or $70,000 worth of work, and we bid the job with the intentions of, if we were fortunate enough to get it, we would have enough profit in it to be worth while. By that I mean we had our mark-up somewhere around 50 per cent above our basic cost. And the contractor that was successful in getting it was about $200 or $300, or maybe $400, under our figure. So you can see that that particular job was quite high.

Q. You checked that job, I mean the aabeta company checked the bid figures on that job?

A. Yes, indeed.

Q. You know about when this check and bidding took place?

A. This particular job was probably about six, eight months ago.

Mr. Black: That of course is objected to as being a matter that obviously relates to a period far beyond the period recoverable in this case.

Mr. Ackerson: It isn't important anyway.

That is all, Mr. Lysfjord.

Mr. Black: One more question or two, Mr. Lysfjord. [639]

(Testimony of Elmer Lysfjord.)

Recross-Examination

By Mr. Black:

Q. Referring again to this matter of these low prices, I refer to the same deposition at page 13, line 24, where the question was asked:

"Q. Would you say the business is said to be a cut-throat business, competitive business?

"A. Are you speaking of now or then?

"Q. Well, let's break it up. Then.

"A. It was not then.

"Q. It was not then. Is it now?

"A. It is, now.

"Q. And how long has the present cut-throat condition, cut-throat competitive condition of the acoustical tile contracting industry existed?

"A. Three months, approximately so.

"Q. From about June of '52?

"A. May or June, somewhere in there."

Does that refresh your recollection, Mr. Lysfjord, as to the period you were taling about with respect to your opinion as to the cessation of any price rigging or anything of that sort?

A. Did I state that there was a cessation of it?

Q. We called your attention to the fact that you gave an opinion that they were no longer refraining from competing [640] or something of that sort.

A. What is the question you want me to answer?

Q. I am asking you now whether that helps, this testimony I have just read—you gave it, didn't you?

(Testimony of Elmer Lysfjord.)

A. Yes, sir.

Q. ——if it helps you to fix that time as to which that opinion relates.

Mr. Ackerson: You mean when it started?

Q. (By Mr. Black): The cut-throat competitive period started in May or June of 1952, according to your testimony. A. That is true.

Q. And that is the period that you are talking about, isn't it?

A. Answering that question, yes, sir.

Mr. Black: Very well. That is all.

Mr. Ackerson: No further questions.

(Witness excused.)

The Court: Next witness.

Mr. Ackerson: I will recall Mr. Waldron on the limited question of damages, your Honor.

WALTER R. WALDRON

recalled as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows: [641]

Mr. Ackerson: Let me have Exhibit 38, please.

(The exhibit referred to was passed to counsel.)

Mr. Ackerson: Might I inquire, your Honor, whether this same schedule will proceed tomorrow? The reason I am asking is that Mr. Lysfjord has a

(Testimony of Walter R. Waldron.)

hospital appointment in the morning. We are through with him.

The Court: His presence here will not be required?

Mr. Ackerson: No.

The Court: I expect to continue tomorrow the same way.

Mr. Ackerson: I mean in the morning. I think Mr. Lysfjord can be here in the afternoon in any event and we can continue in the morning without him.

The Court: We expect to continue Friday on half days. This type of case is, by the nature of the case, dull, kind of hard to take, and I don't think that you can hold the attention of a jury over a full 4½- or 5-hour court day, so it is not provident to work on it more than substantially half days.

Mr. Ackerson: I heartily agree. It is not only difficult to the jury, your Honor, but to the court and the lawyers both.

I just wanted to explain that Mr. Lysfjord's routine was going to change tomorrow and that Mr. Lysfjord would not be here in the morning. [642]

Direct Examination

By Mr. Ackerson:

Q. Mr. Waldron, you have before you Exhibit 38? A. Yes, sir.

Q. Can you state what that is generally?

A. Sheet 1. Is that what you are referring to?

(Testimony of Walter R. Waldron.)

Q. Yes. It is composed of three sheets.

A. Yes, sir.

Q. Sheet 1 contains what sort of information?

A. Well, it a recap of the other sheets I imagine composing the commissions and expected profits in a seven-month period breakdown here, and that is the figures are derived from the build-up of work and sales I had with my former company, and the same processes you have here computed there which arrive at $2500 per month after these figures on the right, the percentage figures, are worked out.

Q. And the base figure, I take it, would be the base figure of your earnings, $1250 a month with the Downer Company?

A. That was my build-up at the time I left and the field was not saturated at that moment.

Q. What do you mean by the field was not saturated at that moment?

A. There was no limit to the acoustical field, and it hasn't had a limit yet, and in my experience in it every year [643] has been a better year for the acoustical industry, and I believe I am safe in saying it will be another 20 years of good work in Southern California.

Mr. Black: That is objected to.

Mr. Ackerson: That has nothing to do with the damage question, Mr. Black. It may be stricken.

The Witness: I am so enthused with Southern California progress in the world that I just can't help but brag on it.

Q. (By Mr. Ackerson): But it was based on

(Testimony of Walter R. Waldron.)

your, what your average for the year with the Downer Company was, or otherwise?

A. I don't have my '50, I have the '51 and '52, and I had the last payment there in January, which was about a month or so, and then later on we got a final settlement, but it was $1500, and I believe my sales of the last three or four months there was about that or greater in profit. I forget just what it was in 1951 because I don't happen to have that return. At least I haven't found it.

Q. It is your statement then that this basic figure, one-half of $2500 per month, is reflected by your earnings from the Downer Company?

A. Yes, sir.

Mr. Black: That is objected to as leading.

Q. (By Mr. Ackerson): State the fact, Mr. Waldron. [644]

A. Well, that is how I arrived at this figure with my build-up of the work I done with these people, and that was the results by the time I left, and that in turn is based on your former calculations over here that we arrived at a figure shown on the right.

Do you want me to go through this, too, Mr. Ackerson?

Q. Yes, if you can go ahead and explain the basis of each of those figures there, it may save time.

A. Well, yes.

In a seven-month period the return to me should be $17,500, and a loss of money in the San Bernar-

(Testimony of Walter R. Waldron.)

dino area again is equal, as this is, $960 as a share of loss, you know, which totals $18,460.

Now less one-half of the year's total profits that we earned, nets a total loss of $17,245.

Have these figures been checked, by the way?

Q. Yes. I don't think there is anything wrong with those figures. I mean there is no mechanical errors in them.

Proceed on to the next group of figures. Go right ahead.

A. Yes, working out the—what I feel as any salesman with experience of at least eight or ten years in this field could do—on this particular one here, I am getting on another subject, but actual cost of purchases, this is on the acoustical tile we purchased.

Q. Yes.

A. Which comes up to a figure of $87,808.97. That is not a part, by the way, of the Flintkote purchase——

Q. That is exclusive?

A. ——as I understand it.

Q. That is exclusive of the first carload of tile, you mean?

A. Yes. I understand that is not supposed to be included here.

Now, on that it has been estimated, since we paid at various times more than this amount covers of 17 per cent overpayment, we felt this was very fair and which meant we should have paid, had we purchased from The Flintkote Company, $66,503.40.

(Testimony of Walter R. Waldron.)

Q. That is the figure that was incorrect.

A. Is that still incorrect?

Q. Mr. Hamiel stated it was a mechanical error. [646]

A. Is this one still incorrect here (indicating)?

Q. Yes. The record should show that that figure should read $57,005.40.

Mr. Ackerson: And while we are about it, Mr. Black, the next figure under that should, therefore, be $12,758.57. And the final figure on the first page should be $6,379.28.

Q. (By Mr. Ackerson): So I think that you had better refer that to the second figure, the second figure which is actually fifty-seven thousand-plus, rather than sixty-six thousand.

Are you through explaining that?

A. Well, I don't have the correction made on this exhibit. I guess it was left here.

Mr. Ackerson: I wonder if we might correct that, Mr. Black, by interlineation now?

Mr. Black: Yes, subject to my right to exclude the whole thing when the time comes.

Mr. Ackerson: Yes, you may object. Do you care to check this with me, the changes, Mr. Black?

I will do the same thing on Exhibit 39, if you have it, Mr. Clerk.

The Clerk: The witness may have it.

Mr. Ackerson: That is right, Mr. Clerk.

Q. (By Mr. Ackerson): As I understand your testimony, this seventy-five thousand-plus figure then represents your [647] calculations of what 17

(Testimony of Walter R. Waldron.)

per cent of the excess—17 per cent over Flintkote carlot price would be, is that right? A. Yes.

Q. How much you would have paid for it from Flintkote? A. Yes, sir.

Q. The $75,000.00 figure is what? What you would have paid for the same tile had you been able to get it from Flintkote? A. Yes, sir.

Q. What is the next figure of $12,758.57?

A. That is an amount we paid greater than competitive firm purchasing from Flintkote.

Q. Now, what is the last figure?

A. That is a share of the overpayment, I will call this $12,000.00 figure. That is the share chargeable to me as my share of overpayment.

Q. Now, turn to the next page.

The Court: How long will it take to go through the document, Mr. Ackerson?

Mr. Ackerson: I think maybe another 15, 20 minutes.

The Court: We had better adjourn then.

Mr. Ackerson: All right.

The Court: We will adjourn until tomorrow at 1:30 for this case. The court, until 9:30.

(Whereupon, at 4:35 o'clock p.m., Thursday, May 12, 1955, an adjournment was taken to Friday, May 13, 1955, at 1:30 o'clock p.m.) [648]

Friday, May 13, 1955—1:30 P.M.

The Court: The jurors and alternate being present, you may proceed.

Mr. Ackerson: Will you take the stand, Mr. Waldron?

WALTER R. WALDRON

called as a witness on behalf of the plaintiffs, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Black: I think that is a tabulation, isn't it?

Mr. Ackerson: Yes.

Mr. Black: I think Mr. Doty has that. He was making a copy. We came up without our copy.

Mr. Ackerson: It isn't in court?

Mr. Black: I think he has it. He thought he would be through in time. Can you use Mr. Lysfjord's?

Mr. Ackerson: Yes, perhaps I can. That is Exhibit 39, and that is right on top here.

We had passed the difference in figures on this, Mr. Black, so I am turning to the third page here.

Direct Examination
(Continued)

By Mr. Ackerson:

Q. I hand you Exhibit 39 for identification, Mr. Waldron, and I will call your attention to certain figures on the third page of that exhibit. [650]

Mr. Ackerson: They should be identical, Mr. Black——

Mr. Black: I think they are the same.

Mr. Ackerson: I believe so.

Q. (By Mr. Ackerson): Mr. Waldron, your at-

(Testimony of Walter R. Waldron.)

tention is called to the third page of Exhibit 39, which we are assuming to be identical in respect to Exhibit 38 relating to your own personal affairs in the aabeta co.

Do you have as the first item there a figure of $21,600.00? Can you tell us the basis for your calculation of that?

A. Yes, that is based upon the sales per month of $18,000.00, which is estimated were conservative figures, and then the total amount was the yearly profits on that gross sales for that one-year period.

Q. Was that based on your Downer sales or your actual sales?

A. Yes, the Downer sales that we were doing or I was doing at the time I severed with the people over there.

Q. Now, the second figure is $32,400.00, based upon what?

A. That is normal expected increase of 50 per cent sales on a second year period, and this, I believe, is for the year of—includes 1952, '53 and '54.

Q. Yes. $32,000.00 figure being '53, I believe, isn't that right? [651]

A. Yes, that would be the year '53.

Q. That is still based upon your best estimate of your sales with the Downer Company?

A. Yes.

Q. Now, the third figure there is $43,200.00.

A. That is, I would say, a conservative estimate of a 25 per cent increase over the previous year of sales for the year of 1954.

(Testimony of Walter R. Waldron.)

Q. That is your estimate? A. Yes.

Q. Now, there is a dash there and then addition, and the figure of $97,200.00.

Will you explain that figure and the basis of your estimate of that figure?

A. That is the total of the estimated three-year period of '52, '53 and '54.

Q. That is your share of the profits of those three periods, your estimate of your share of the profits of those three years?

A. That is right.

Q. What is the figure $21,411.50 directly under that?

A. That is my share of the earnings of the aabeta co. during that period.

Q. During the same three-year period?

A. Yes. [652]

Q. And that is '52, '53 and '54?

A. That is correct.

Q. Then you have the final figure of $75,788.50. Will you explain your calculation in that respect?

A. Yes. We subtracted the actual, or my actual amount of earnings during that period from the estimated amount of $97,200, and the answer of $75,788.50 was the estimated loss due to restraint of competitive material.

Mr. Ackerson: I would like to have this next paper marked Plaintiffs' Exhibit for identification next in order.

The Clerk: That will be Plaintiffs' Exhibit 43 for identification.

(Testimony of Walter R. Waldron.)

(The document referred to was marked Plaintiffs' Exhibit No. 43 for identification.)

Q. (By Mr. Ackerson): Mr. Waldron, I hand you Plaintiffs' Exhibit 43 for identification and ask you if you can tell me what that document purports to be.

A. Well, this is a form to show that using our estimated monthly earnings during our business time with what I was earning at the time I stopped work with the Downer Company, and without going into expected normal increases of business, we have here $1250 per month for each plaintiff in this case, or $2500 per month for both during the periods which equals $90,000. [653]

Q. During what period does that purport to cover?

A. This is during the period January 1, 1952, to January 1, 1955.

Q. That you stated does not cover any estimate of increase in business, it is based solely upon your earnings with the Downer Company?

A. Yes, that is correct.

Q. Now the $90,000 in that particular item constitutes what?

A. The $90,000 only constitutes the $1250 a month for myself and for my associate during the 3-year period, or 36 months of the three years in question here.

Q. In other words, the salary or commissions

(Testimony of Walter R. Waldron.)

which you state you earned from the Downer Company prior to going into business without more, is that correct? A. That is right.

Q. Now you have under that the figure of $42,823. What is the significance of that figure? What do you base that figure on?

A. On our books that we have here of the total earnings of the aabeta company during that period.

Q. During what period?

A. January 1, 1952, to January 1, 1955.

Q. And by the books you mean this ledger book that has been marked for identification? [654]

A. The general ledger.

Q. And you are referring to Exhibit 42 for identification, Plaintiffs' Exhibit 42? A. Yes.

Q. Now, Mr. Waldron, you have a third figure on that column, on the tabulated side, the sum of $47,177. Can you explain that figure?

A. Yes. The $90,000 based on the monthly earnings before we entered business and we subtracted the actual earnings during that 3-year period and that would be the net loss based upon the earning period we had prior to going into business.

Q. In other words, the $47,000 plus figure is the difference between what you actually earned with the aabeta company during that 3-year period as against the salary projected during that period that you were earning with the Downer Company?

A. Yes.

Q. Now there is a fourth figure of $90,000. How did you arrive at that figure?

(Testimony of Walter R. Waldron.)

A. That is if we were to go into it and assume the normal business would return, as we have in the past and so calculated on your blackboard, there would be an additional $90,000 as a profit for a company after you take the overhead and sales costs out. [655]

Q. Then the next figure, the next succeeding figure is again $47,177. How did you arrive at that figure?

A. That was the figure we had net loss based on the first figure of $47,177. We brought that down and added it into the $90,000. Is that the correct figure that you are working on? [656]

Q. Yes. Now then, the $90,000.00 under that last $47,177.00 is what?

A. That is the figure of the—owner's profits as before stated, after overhead and sales costs have been deducted.

Q. Now, you have a final total figure there of $137,177.00. Would you tell us what that consists of, how you arrived at that?

A. Yes. That is the salary loss figure of $47,-177.00, and then the normal profits as an owner loss of $90,000.00; added together we arrive at $137,-177.00.

Q. These exhibits, or this Exhibit 43 for identification, which we last referred to, and Exhibit 38 constitute your estimates of your total losses or damages in this case, as far as it applies to you personally?

A. Yes. We didn't bring into consideration from

(Testimony of Walter R. Waldron.)

the end of '53 or '54. We are not considering anything as of the first of the year up to date.

Q. Did you consider in this last Exhibit 43 for identification any factor prior to January 1, 1952?

A. No, sir.

Mr. Ackerson: Your Honor please, I will offer Exhibits 38, 39—I will take them separately.

I will offer Exhibit 38 in evidence as a tabulation of this witness' estimate of his damages. [657]

Mr. Black: To which we object, the court please, on the ground that no foundation whatever has been laid for the figures showing in this document.

It has been proved demonstrably erroneous. It is based on the sheer speculation of these witnesses on completely gratuitous assumptions, events that have no basis in the evidence as possibly foreseeable.

And for the further reason it extends, obviously, the damages beyond the recoverable period in this action, namely, the date of filing of suit.

For all of these reasons and the further grounds that it is incompetent, irrelevant and immaterial, we object.

The Court: What is the foundation for it, Mr. Ackerson? State it fully for the record.

Mr. Ackerson: The foundation, your Honor, has been the manner in which the documents have been prepared, the basis of them and the purpose of the introduction is limited to a physical exhibit of the opinion evidence of this witness.

The Court: Objection overruled. Document admitted.

(Testimony of Walter R. Waldron.)

(The document heretofore marked Plaintiffs' Exhibit 38 was received in evidence.)

Mr. Ackerson: I will offer for the same limited purpose Exhibit 39.

Mr. Black: We interpose the same objection to this document, if the court please. [658]

The Court: Same ruling.

(The document heretofore marked Plaintiffs' Exhibit 39 was received in evidence.)

Mr. Ackerson: And I will offer for the same purpose, same limited purpose, Exhibit 43 for identification.

Mr. Black: To which we make the same objection, and the further objection to this document is that this builds speculation upon speculation.

This last document is predicated on the assumption that these people, establishing their own new business, would start out making precisely the same volume that they did with another company, financed by a company that was adequately financed. And gratuitously assuming that they are going to have the benefits of an owner immediately.

They start in business as of the first of the year when, on their own testimony, they didn't even start operations in the way of making any money after they got their business organized for several months.

It just is demonstrably inaccurate in every possible view. On those reasons and for the others we object to this.

(Testimony of Walter R. Waldron.)

The Court: The further reason goes to the weight of the evidence, what weight will a jury give it. They may accept it in whole or they might accept it in part or they may reject it.

It might be subject, as an estimate, to considerable [659] modification before it is accepted, if it is ever accepted at all, as an appropriate measure of damages, if any are awarded.

The objection is overruled. The document is admitted.

(The document heretofore marked Plaintiffs' Exhibit 43 was received in evidence.)

Mr. Ackerson: You may cross-examine, Mr. Black.

Cross-Examination

By Mr. Black:

Q. What was your initial investment in the aabeta co., Mr. Waldron?

A. You are speaking of dollars?

Q. Dollars.

A. In adition to my 20 years, I guess.

Q. I am speaking of dollars at the moment.

A. I think the initial investment during the year of '52, as we needed it, was around five, six thousand dollars on my behalf.

Q. Well, I meant by "initial," what was the amount you put into the business when you started?

A. Actually whatever we needed. I think we put in about six thousand—or about six thousand, I think, or nine, six or nine.

(Testimony of Walter R. Waldron.)

Q. The two of you?

A. I believe so. We usually do—I think so. [660]

Q. And for the entire year, how much money did you put into the business, yourself?

A. All of the profits, Mr. Black, were put back into the business, in addition to moneys of our own, and we didn't draw out of the business that year. We used our own private money. So any moneys that were made, whatever the books show, were reinvested back into the business. I don't know what the total of that is.

Q. Did you put any more than the $3000 of your own money into the venture?

A. Oh, yes. I put in somewhere around $5,000 I believe.

Q. In addition to the plowing back of earnings, you mean? A. Yes.

Q. When did you put in the additional $2000?

A. I don't know. Some time during the first part of the year when it was necessary.

Q. Would that be reflected by the books of the company? A. I believe it would.

Q. Can you turn to the account where that appears?

A. I doubt if I could, Mr. Black. I am not acquainted with the book.

Q. What do you base your statement that you put in the [661] $2000 on? Is it just your own recollection?

A. It was deposited, and I am sure there is a credit there in my behalf for it.

(Testimony of Walter R. Waldron.)

Q. But you don't know enough about the books to point to the place where it would show?

A. No, I don't know how to even find it, sir. I am sure it is there and I believe someone with knowledge of the books could find it.

Q. I presume that is so. I was just testing your knowledge of it.

Did Mr. Lysfjord put in a similar sum to you?

A. Yes, I am sure he did.

Q. Did you match dollar for dollar what you both put into the company?

A. Not always, but we tried to very closely.

Q. So that to the best of your recollection, then, the entire amount that you have put in of your own funds into this venture was $5000?

A. Somewhere in that neighborhood the first year, yes.

Q. Thereafter did the business carry itself?

A. Virtually.

Q. You didn't have to make any additional investment beyond what you earned from the business itself?

A. I would have, Mr. Black, and I anticipated it, but when we lost our line of supply it curtailed our activity a [662] great deal.

Mr. Black: I will move to strike that as not responsive, your Honor.

Mr. Ackerson: I think it is responsive, your Honor.

Mr. Black: We have something for a ruling,

(Testimony of Walter R. Waldron.)

your Honor. Would the reporter please read the question and the answer and the objection?

The Court: Yes. I was busy on another matter. Read it, Mr. Reporter.

(The record referred to was read by the reporter as follows:)

"Q. You didn't have to make any additional investment beyond what you earned from the business itself?

"A. I would have, Mr. Black, and I anticipated it, but when we lost our line of supply it curtailed our activity a great deal.

"Mr. Black: I will move to strike that as not responsive, your Honor.

"Mr. Ackerson: I think it is responsive, your Honor."

The Court: Motion granted.

Q. (By Mr. Black): Then would you please answer the question? Would you repeat the question, Mr. Reporter? [663]

(The question referred to was read by the reporter as follows):

"Q. You didn't have to make any additional investment beyond what you earned from the business itself?"

Q. (By Mr. Black): That calls for a yes or no answer, Mr. Waldron.

A. Anywhere in this year you are referring to?

Q. No, during the entire history of the business.

(Testimony of Walter R. Waldron.)

A. Yes. Later on I put another $3000 into the business. I believe you will find that in there but I think that was in '53—I don't know—'52 or '53.

Q. Beyond what the business was earning?

A. Pardon?

Q. Beyond what the business itself was earning? Was that an additional $3000 that was put in in addition to what you had plowed back into the business? A. I think it was, sir.

Q. Are you sure of that? A. Yes.

Q. And you think it was sometime in 1953, then?

A. I am not sure of the time, Mr. Black, but there would be an entry there.

Q. Are you sure of the amount?

The Court: Counsel, excuse me for a moment. This matter [664] that we have been discussing on the side with the probation officer involves a long distance telephone call which he has managed to put through to a distant official, and he is still on the line, and he asks that I should talk to him. So we will stand in short recess while I do that.

(Short recess.) [665]

Q. (By Mr. Black): Do you know how much working capital the Downer Company had during the period you were operating with them?

A. No, I don't.

Q. Have you any idea of that at all?

A. No, I had no way of knowing that, Mr. Black.

Q. How were your sales commissions actually

(Testimony of Walter R. Waldron.)

computed when you were working with the Downer Company?

A. After the actual costs of the jobs were estimated, and before overhead was entered into the picture, the remaining sum would be the gross profits that I participated in.

Q. What do you mean "the remaining sum"?

A. After the job costs are deducted.

Q. What went to make up the deduction as a job cost? A. Material and labor.

Q. Anything else?

A. Only thing I can think of, taxes, insurance on labor, trucking or cartage facilities.

Q. Was that a sum that varied each time with every job?

A. Only in the sense of the volume. Taxes would be greater with greater volume. Insurance on labor would be greater if there were more labor spent. But the per cent would be the same in each case.

Q. All right. After the job cost was deducted from the gross receipt of the Downer Company for the particular job—— [666]

A. It would be deducted from the contract price.

Q. After that was done, what percentage of the remainder did you receive as a commission?

A. About one-third, sir.

Q. One-third? A. Yes.

Q. Was that the same on all jobs, public or private?

A. I believe it was, except the last month or so and they lowered the percentage for salesmen on

(Testimony of Walter R. Waldron.)

public jobs. I can't remember when or how early, but just four or five per cent, something like [667] that.

Q. You don't know what percentage or when it was done?

A. I don't remember that at the moment.

Q. Did you ever examine the books of the Downer Company? A. No, I never did.

Q. Now in your relations with the Flintkote Company, did you ever have any arrangement whereby you could purchase from the Flintkote Company decorative tile or building board?

A. Yes, it was my understanding—you see, a decorative tile is blank before perforation, and we were to buy that as we needed it, and that is used in our line a great deal.

Q. Now, when did you make those arrangements?

A. At the time we made the arrangement to become a distributor for the Pioneer-Flintkote people.

Q. And with whom?

A. I don't know which one, Baymiller or Mr. Thompson. At any rate, that is part of their line, and the reason I wanted to bring that out as being a part, is that they had a detail of a T & G, which is a tongue and groove, that wasn't at all adapted to labor conditions and they were planning to change that on their decorative materials.

Q. Did you ever have any expressed discussion with anybody in the Flintkote Company about the

(Testimony of Walter R. Waldron.)

availability to you of decorative tile or building board? [668]

A. I believe I did, Mr. Black. I believe that that is part of the line and we have to use it.

Q. That is just your assumption, that that is part of the line. When did you have that discussion and with whom and what did you say and what was said to you?

A. At the time of the discussion of it, as I say, of the T & G joint of this decorative board.

Q. When did you discuss the T & G joints of the decorative board?

A. During the time that we were operating and in business in the early part of January or early February, because the samples were not adapted to competitive materials for labor installation costs.

Q. And with whom did you have that discussion?

A. I think it must have been Mr. Ragland because he would be the one that had the sample and we would work through him on anything we needed. That was understood.

Q. Do you actually remember such a discussion?

A. Yes, Mr. Black, because of the detail of that T & G joint was disturbing in labor.

Q. Didn't you know, as a matter of fact, based on your general knowledge of the acoustical business in this community, that the Flintkote Company has never supplied any acoustical contractor with building board or decorative tile on a direct [669] basis?

(Testimony of Walter R. Waldron.)

A. I don't know what they are doing now, but——

Q. I am talking about ever.

A. I don't think——

Q. Since they started the line.

A. I know that that was our concern, and they were going to arrange to change that.

Q. And you say Mr. Ragland told you that they would change it?

A. Yes, as a matter of fact, I believe they did.

Q. When did they do it?

A. I don't know. It was some time after we were severed there.

Q. Where was this discussion had?

A. I believe it was in my office here in Los Angeles.

Q. Did you ever place an order with Flintkote for building board or decorative tile during the time that you had any relations with them?

A. No, sir.

Q. Now referring to Plaintiffs' Exhibit 38, Mr. Waldron, did you have anything to do personally with the calculation of the figure which you set out as the actual cost of tile purchased occurring on the first page of that exhibit in the amount of $87,-808.97?

A. No, as I remember, that was handled by our accountant. [670]

Q. Do you have any personal knowledge so far as the correctness of this list goes?

A. Only that I understand it is correct and it

(Testimony of Walter R. Waldron.)

would be substantiated by the invoices it was taken from.

Q. Did you examine the invoices?

A. No, I didn't.

Q. Did you examine the books?

A. Our books?

Q. Yes. A. Regarding this item?

Q. Yes. A. No, I didn't.

Q. Do you have any personal knowledge as to the correctness of that figure?

A. I didn't do the job of tabulating this. I believe it is correct, however.

Q. Do you have any knowledge based on what you personally examined as to whether that figure is entirely composed of acoustical tile or other materials that you had a right to purchase from Flintkote on a preferential basis?

A. No, I don't know. My understanding is it is supposed to be acoustical tile.

Q. But you don't know at all of your own knowledge?

A. I believe it is acoustical tile. I didn't examine it. [671]

Q. Please answer my question. And it is entirely based on what you believe from what somebody told you, is that right?

A. In this case it was my belief that it was acoustical tile, decorative tile. [672]

Q. But you never made any personal check whatever?

A. I didn't check it, that is right, sir.

(Testimony of Walter R. Waldron.)

Mr. Black: I move to strike——

The Court: Who prepared this statement or estimate, or whatever the exhibit is?

The Witness: My associate and my accountant.

Mr. Black: I renew the motion to strike the exhibit on the further ground it is demonstrated by the witness' own statement he doesn't have any idea of the correctness of that figure whatever.

Mr. Ackerson: The foundation, your Honor, I might suggest was laid by Mr. Lysfjord and the accountant, as to what the instructions were and what was purported to have been done.

The Court: Did their testimony relate to this particular document?

Mr. Ackerson: Yes.

The Court: You mean Mr. Lysfjord testified——

Mr. Ackerson: Mr. Lysford and Mr. Hamiel. I think Mr. Black cross-examined them both on them.

The Court: Was the document marked for identification at that time?

Mr. Ackerson: It was, your Honor. I would like to ask one further question on voir dire, if I may.

The Court: All right. [673]

Mr. Ackerson: Did you instruct your accountant or the people who prepared this Exhibit No. 40, that is, all the invoices and the corresponding exhibits, as to how it should be done?

The Witness: Yes, we asked—or I asked in my behalf to have it arranged with the acoustical tile, or fibertile, or fiberboard that we have used.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: And that document was prepared under your instruction and your partner's instruction?

Mr. Black: That is objected to as leading.

Mr. Ackerson: Well, I don't believe the witness understood.

State the fact then, Mr. Waldron.

The Court: Objection overruled.

The Witness: That is right. However, I didn't examine the results as per tabulation. I didn't put it on the machine, or anything of that nature.

Mr. Ackerson: In other words, you didn't go over each invoice and check it with the person you instructed to do the job, as to accuracy of each item?

The Witness: No. There were two people working on it, one the accountant and one his secretary or girl he had. I have confidence that it is true.

Mr. Ackerson: They did follow your instructions?

The Witness: Yes. [674]

Mr. Ackerson: I submit, your Honor, this foundation was laid and has been cross-examined by Mr. Black, both as to Mr. Hamiel and Mr. Lysfjord, and I think it is clearly admissible.

Mr. Black: It has been completely demonstrated that there are a lot of things in this item admittedly that do not belong in it. The amount of it is still uncertain, but it is proved that it isn't accurate.

Mr. Ackerson: Well, Mr. Black has pointed out

(Testimony of Walter R. Waldron.)

a $2.00 item and a $3.00 item and two or three things like that. He has had it for two or three days——

Mr. Black: Do you want me to spend the day on it, I can go through every invoice in it.

Mr. Ackerson: I don't mind if you do. It still goes to the weight of the document.

Mr. Black: I submit if we prove there is one dollar off we have shown the document is wrong. You have made no effort to correct the thing and eliminate the items the witnesses so far have admitted don't belong in it.

Mr. Ackerson: I submit that goes to the weight of the document, not to its foundation or admissibility.

The Court: The motion to strike the exhibit is denied.

Q. (By Mr. Black): What is the basis for your assumption that you would have sold one car per month during the year 1952? [675]

A. This, Mr. Black: We were not starting a new business, we were just starting a new name. We had been in the business for a long time and had these associate contacts over the years.

We are sure—at least I am, that that would take place. You understand the lag, Mr. Black, of the first few months of your contracts, until building time, and in a case like that you might install, or we would probably install the most of that year's material average in the last six months. That has been done.

(Testimony of Walter R. Waldron.)

Q. Why didn't you sell a car in January, 1952, Mr. Waldron, when you had tile available?

A. I am not sure we didn't, Mr. Black.

Q. Well, your accountant has demonstrated you didn't.

Mr. Ackerson: I think that is assuming a fact contrary to the evidence, your Honor. Mr. Black is talking about sales, rather than installation.

There is no evidence here but what that carload was sold during the first ten days of their operation.

Q. (By Mr. Black): Well, do know that you sold one car in January, 1952?

A. I don't know at the moment, Mr. Black. But I rather imagine that we had commitments that would cover two cars.

Q. With whom? [676]

A. I don't know at the moment, but one——

Q. In January, did you have a commitment for two cars?

A. I don't remember, Mr. Black, but one job——

Q. Just a moment.

Mr. Ackerson: Wait a minute. Let the witness complete his answer, Mr. Black. This is argumentative, and I object to it, the witness not being able to complete his answer.

Mr. Black: All right. Let him answer.

Q. (By Mr. Black): Did you have a commitment in January 1952 for two cars of tile?

A. Are we talking about the same thing, Mr. Black?

Q. I am talking about a very simple thing. Did

(Testimony of Walter R. Waldron.)

you have a commitment in January, 1952, to sell two cars of tile?

A. I don't know if I can answer that the way you have put it to me.

The Court: He said a commitment. I take it he means a total in commitments that would equal that quantity of tile.

Mr. Black: Made in the month of January, 1952?

The Witness: I don't know at the moment, Mr. Black, and the bids we had out, which are commitments on our part and acceptable by other people, when they get around to buying their material for that piece of work, it may not be purchased until 30 days before it goes in.

That is what I mean about having commitments out. They are proposals and we are held to them, by the way. [677]

Q. (By Mr. Black): What do you understand by a commitment?

A. A proposal. If I send out a proposal or if I phone a bid in I have committed myself for that job when and if it goes in, or it is built.

Q. You mean an offer to do a job unaccepted by anybody?

A. It is not unaccepted. They accept my bid and it is accepted until they decide it is good or bad. Usually it is accepted and they don't pick it up until about 30 to 60 days before they expect an installation.

Q. By that, I take it you mean by "commit-

(Testimony of Walter R. Waldron.)

ment'' a contract to supply tile that somebody has accepted and you are bound by it?

A. I am bound by my figures that I send out, Mr. Black. I am bound by any bid when that—that I send out, whether they accept it right now or not.

I am bound by that bid if they accept it six months from now; I am still bound to that one figure even then.

Q. Did you have any firm contracts made in January, 1952, for the sale of a car of tile?

A. No. It doesn't operate that way.

Q. Why doesn't it?

A. Unless the job was going in that month or early the next month there wouldn't be any, because they don't get [678] around to doing that, at their convenience, in buying the material for that particular piece of work, until about 30 to 60 days before it goes in, which might be four, five, six, seven months away, depending on the size of the job or the progress of the job.

Q. How about February, 1952, did you have any commitments for tile in that month?

A. I had many commitments out, Mr. Black, and I believe your company supplied us on that basis, didn't they, the last, odd size tile? That wasn't in the first car.

Q. That was the total of your commitments, was it not, up to the time of the termination?

A. Of odd size tile.

Q. Of any tile?

(Testimony of Walter R. Waldron.)

A. Oh, no. We had a carload there, you know.

Q. I know you did, but it has been testified to in this case that when Flintkote terminated you you were given the opportunity of buying additional tile for any outstanding commitments you then had, without deductions for the car that had theretofore been supplied you, is that correct? Or isn't it correct?

A. You are correct. However, they denied me commitments, I have signed purchase orders for, which, I believe, there are two in these exhibits some place.

Q. Those were merely sales of material [679] and they weren't installation jobs, am I right on that? A. I believe you are right.

Q. You wouldn't have made the same profit on that operation that you are claiming that affects your installation—with respect to your own installation jobs, would it?

A. I imagine it would be pretty close to the same, Mr. Black.

Q. You mean to say if you sell tile to the Downer Company you are going to get $18,000.00 for $6,000.00 worth of tile?

A. No. Your $18,000.00 is an installed job, Mr. Black, and the amount of profit on that is based on the cost somewhere below $18,000.00.

Q. How much of a markup, in point of fact, did you have on the tile that you were supposed to resell to the Downer Company?

A. I don't remember, Mr. Black, and I couldn't

(Testimony of Walter R. Waldron.)

tell you now, because we didn't get the tile from you people to give him; you refused it.

Q. Well, do you recall what the total quantity of tile you obtained from Flintkote to fill—what was the total quantity of tile you obtained from Flintkote to fill your commitments?

A. No, I don't have it in mind.

Q. It amounted to about a half a car, didn't it?

A. I don't know for sure. That could be. I am sure you have the figures there. [680]

Q. Now what facts do you base your statement that you would have sold one and a half carloads a month during the year 1953?

A. Just normal expected increase in good will and sales, promotional work, Mr. Black.

Q. This was the first new enterprise you had ever started, is that correct?

A. No, it wasn't.

Q. What prior experience have you had in starting your own business?

A. This is the only acoustical business I have worked in on my own, Mr. Black. Is that what you have in mind?

Q. So you have no prior experience to guide you in connection with the expectation of a new enterprise just starting in business, do you?

A. I can't think of one.

Mr. Ackerson: You mean the aabeta company?

Mr. Black: His own personal experience.

The Witness: In the construction field I haven't

(Testimony of Walter R. Waldron.)

had a business concerning construction work prior to that time.

Q. (By Mr. Black): That wouldn't be comparable in any way to this business, would it?

A. Construction?

Q. Yes. [681] A. That is this business.

Q. What new enterprise then did you start other than the aabeta company, and when was that?

A. The only thing I did was, I would buy and sell property occasionally, and one project of building an apartment house.

Q. This was the only business that you ever started on your own as a business, is that right, I mean apart from casual adventures in real estate for speculation or something of that kind?

A. Yes, I believe you are right there, Mr. Black.

Q. So that it boils down to this, that that figure is what you thought you would like to be able to do rather than what you thought was reasonably probable based on any experience you might have had?

A. No.

Mr. Ackerson: I submit, your Honor, that that is contrary to the witness' testimony, and is argumentative and not proper cross-examination.

Mr. Black: I will withdraw it.

The Court: Overruled.

Mr. Black: I think that is all, Mr. Waldron.

Mr. Ackerson: I have just one or two questions, your Honor. [682]

(Testimony of Walter R. Waldron.)

Redirect Examination

By Mr. Ackerson:

Q. Now, Mr. Black has asked you about your initial cash deposits with the aabeta company, Mr. Waldron, and I call your attention to Plaintiff's Exhibit 1 in evidence and ask you whether or not in obtaining this Flintkote supply you pledged the assets mentioned in that statement.

A. That is right, sir.

Q. And what were the total assets there of yourself and your partner?

Mr. Black: Pardon me. I was inattentive. Would you let me have the last question?

(The record referred to was read by the reporter, as follows:)

"Q. Now Mr. Black has asked you about your initial cash deposits with the aabeta company, Mr. Waldron, and I call your attention to Plaintiff's Exhibit 1 in evidence and ask you whether or not in obtaining this Flintkote supply you pledged the assets mentioned in that statement?

"A. That is right, sir.

"Q. And what were the total assets there of yourself and your partner?"

Q. (By Mr. Ackerson): What was the total amount of those assets as shown by that [683] statement? A. $50,250.10.

Q. So that when you were answering Mr. Black's questions you were talking about out-of-

(Testimony of Walter R. Waldron.)

pocket money? A. That is right.

Q. Now, Mr. Waldron, did you mean to testify in your direct examination that you based your estimate of the aabeta company's losses in any wise on the capital of the Downer Company?

A. I don't believe I did.

Q. Did you base it upon the total sales of the Downer Company? A. No, my sales.

Q. You based it on your sales?

A. That is right.

Q. Without regard to other salesmen who may have been working at the Downer Company?

A. That is right.

Q. Were there other salesmen besides you and Mr. Lysfjord?

A. Yes, I believe there were three or four others.

Q. But your estimates were based upon the performance only by yourself and Mr. Lysfjord, is that correct? A. That is correct.

Q. Did you ever have any conversation with anybody from the Flintkote Company in which the Flintkote line—I [684] mean a restricted amount of Flintkote line—was discussed in connection with the aabeta company's operations? Do I make myself clear? A. I wish you would rephrase it, sir.

Q. I will rephrase it then.

Did anybody from the Flintkote Company ever tell you, Mr. Waldron, that you could only handle 12 x 12 one-half inch tile of the Flitnkote Company? A. No, sir.

Q. Did they ever say you could only handle

(Testimony of Walter R. Waldron.)

three-quarter inch 12 x 12 tile? A. No, sir.

Q. Was there any mention in any conversation as to the types of Flintkote tile that you could handle? A. No, sir.

Q. Or the types of Flintkote products, general acoustical tile products, that you could handle?

A. Not to my knowledge, sir.

Q. Now you have stated in response to a question on cross-examination that you never did place an order for, I think it was, decorative tile manufactured by Flintkote, is that correct?

A. That I didn't place an order?

Q. Yes, with the Flintkote Company.

A. That is true. [685]

Q. Did you ever have any need for decorative tile prior to February 19, 1952, when you were terminated? Did you ever have occasion to place such an order with Flintkote?

A. I didn't use any. We used one job, I think prior to their arrival of material, but we used another brand. I think it was early in January of '52 we did a suspended ceiling job for a furniture store over here on Pico and La Brea, I believe.

Q. And that was——

A. We used the decorative board.

Q. And that was before you had received your initial order from Flintkote?

A. I don't know for sure, but I think it was. However, the job was an existing building and there was no waiting period for construction, and I don't know just what time it was, but it is fast,

(Testimony of Walter R. Waldron.)

and we didn't buy it from Flintkote because it would take a delay of time to get it through the carload material that we were purchasing.

Q. So that up to the time of February 19 when you were cut off, did you have any other occasion to place an order for decorative tile with Flintkote?

A. No, we didn't have a firm contract on anything that had decorative tile in it at that time.

Mr. Ackerson: That is all.

Mr. Black: No further questions. [686]

(Witness excused.)

Mr. Ackerson: The plaintiff rests, your Honor.

Mr. Black: At this time we would like to make some motions, if the court please, which probably should be made in the absence of the jury.

The Court: Very well.

Members of the jury, you will retire to the jury room until you are called.

(Whereupon, at 2:40 o'clock p.m., the jury retired from the court room.) [687]

(Whereupon the following proceedings were had out of the hearing and presence of the jury:)

Mr. Black: May it please the court and Mr. Ackerson, at this time we move for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure, and at the same time we wish to present a motion to strike.

As both motions proceed largely on the same

grounds, I shall argue the matters that are common to both motions together and then separately deal with the motion to strike.

At this time I will not specify the precise evidence, other than simply the evidence that we are proposing to strike is the hearsay testimony regarding Ragland's alleged admissions, all evidence of alleged acts and declarations of alleged co-conspirators, or records of the Downer Company and the acoustical tile contractors, all evidence of alleged damage sustained by reason of any failure to supply tile subsequent to July, 1952, when this action was started, and all exhibits supporting any or purporting to support any damage sustained subsequent to that date.

The plaintiffs claim they have sustained injuries as the result of an alleged violation by The Flintkote Company and other persons of Section 1 or Section 2 of the Sherman Act.

They must, of course, adduce elements which tend to prove all the elements of a cause of action entitling them to recover under Section 15 of the Clayton Act. [688]

Now, one of the crucial questions in the case, therefore, is whether there is competent evidence that The Flintkote Company was a party to an unlawful contract, combination or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce.

We may state, as a basic proposition, that The Flintkote Company can be liable for refusal to sell acoustical tile to the plaintiffs only if such refusals

to sell were in furtherance of and as a consequence of a knowing participation in an unlawful contract, combination or conspiracy. That proposition is supported by the case of Johnson v. Yost Lumber Company, 117 Fed. 2d 53, at page 62, a case from which I have extensively read during the course of this trial.

A recent case announcing the same doctrine is Interborough News Co. v. Curtis Publishing Company, 127 Fed. Sup., 286 at 301.

It is also abundantly clear from the case that unless there is other independent evidence of The Flintkote Company's participation in such a conspiracy, admissions made outside of court by members of the alleged conspiracy, other than by The Flintkote Company, may not be considered on that issue.

Another basic proposition to this case, which I don't think can be disputed, is that The Flintkote Company or [689] anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy, may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatsoever.

That is, of course, the familiar doctrine of the Colgate case, United States v. Colgate & Co., 250 U.S. 300, 39 Supreme Court 465, which has never been departed from.

Thus, the motion for a directed verdict in this case reduces itself to the question whether there is substantial competent evidence tending to prove

that defendant's refusals to sell tile to the plaintiffs were as a consequence of its participation in an illegal contract, combination or conspiracy.

In this connection, the fact that the evidence may show that The Flintkote Company declined to sell or discontinued selling acoustical tile to plaintiffs, as a result of pressure brought upon The Flintkote Company by other persons, would not in itself support a finding that The Flintkote Company participated in any unlawful conspiracy, even if that pressure was a result of a conspiracy among such other persons.

There would have to be knowledge plus participation. In order——

The Court: Wouldn't going along with those who were [690] exerting the pressure be participation? It would be a grumbling entry into the conspiracy, but wouldn't it be entry into it?

Mr. Black: No, not unless the pressure were conspiratorial in character, accompanied by combination, accompanied by threats of a group unlawfully exerting such pressure.

Individual action by the entire group would not even be an inference of an unlawful conspiracy. That is squarely held by the Yost case.

In this case The Flintkote Company, therefore, can be liable only if its refusals to sell to plaintiffs resulted from a knowing participation in the combination of the acoustical tile dealers, in connection with some unlawful combining or conspiracy brought home to The Flintkote Company.

Now, we may lay aside at the very outset any problem in this case which might confront one of the other acoustical tile dealers, if he were still a defendant in the case. We may concede at the very outside that if that were the situation there would be enough evidence in this case of something irregular at the level of bidding and price fixing to create, at least, an inference that the jury would be entitled to consider that such acoustical tile dealers were, at least, put to their proof of explaining the apparent concert that might be properly inferred from some of the evidence in this case. [691]

But the defendant in this case is not a participant in any of those operations and could not be because it is not engaged in the business of installing acoustical tile. It, therefore, can be brought into this case only if knowledge of that or some other illegal combination has been brought home to it.

The Flintkote Company, therefore, could not be found to have knowingly participated in any conspiracy, unless competent evidence has been introduced as such knowledge.

Now, the claim upon which relief may be granted cannot be established by Flintkote, by even a showing that there possibly was conspiracy among the acoustical tile contractors to prevent plaintiffs from securing supplies sold by The Flintkote Company or for any other illegal purpose.

Under the plaintiffs' version of the facts in this case, evidence that The Flintkote Company knew of the existence of such a conspiracy is indispensable. Without such knowledge, it is clear under the law

that the jury may not be permitted to find that The Flintkote Company violated the antitrust [692] laws.

Further, the fact that substantial evidence has been introduced sufficient to support a finding by the jury that The Flintkote Company yielded to pressure will not in itself support an inference that The Flintkote Company had knowledge that there was a conspiracy among the acoustical contractors to deprive plaintiffs of their source of acoustical tile.

Now since The Flintkote Company could not have participated in the conspiracy without knowing that the conspiracy existed, the question becomes critical whether plaintiffs have introduced substantial competent evidence to the effect that The Flintkote Company yielded to pressure and did so with knowledge that a conspiracy existed which had as its objective depriving plaintiffs of their source of acoustical tile.

We take the position that there is nothing in the evidence which tends to establish that fact of knowledge.

Now there is certain testimony which defendant maintains was erroneously admitted over its objection and erroneously permitted to remain evidence by the denial of a motion to strike. And in this connection we refer specifically to the testimony of Mr. Lysfjord appearing at pages 381 and 387 of the transcript, relating to the alleged admission by Mr. Ragland of a meeting at the Atlantic Avenue address where he is supposed to have made

statements to Mr. Lysfjord in connection with some meeting at the—it doesn't appear where— [693] but at least a meeting of some of the acoustical tile contractors with a Mr. Sidney Lewis of The Flintkote Company.

Now there is some other testimony by Mr. Waldron at pages 118, 122, 130 and 131 which is subject to the same objection, although that particular testimony falls short of even inferring a combination such as might be inferred from the testimony given in Mr. Lysfjord's version of this alleged meeting.

The factual situation is simply this: The witness has been permitted to testify concerning conversations had with an employee of defendant wherein that employee related certain conversations which had occurred a week or more prior thereto in the course of a meeting between another employee of defendant and two Flintkote acoustical contractors.

The admissibility of that testimony upon the foundation existing at that time, or at the present time for that matter, becomes clear upon a close examination of the rule which permits declarations of an agent to be attributed to his principal.

Wigmore points out the old case of Franklin Bank v. Pennsylvania D. & M. S. N. Co., 11 G. & J. 28, 33, third edition of Wigmore on Evidence, Section 1078, page 120:

" 'But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an [694] act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer,

are not binding upon his principal, not being part of the "res gestae," and are not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done—not a part of the transaction, but only statements or admissions respecting it.' "

Fletcher in his treatise on corporations, states: "Declarations or admissions of an officer or agent of a corporation are not binding upon it, nor admissible in evidence against it for any purpose, unless they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his authority, or unless they were expressly authorized by the corporation, or have since been ratified by it."

Further:

"That the officer or agent, at the time he made the statement, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with, the business then pending." [695]

In addition, Fletcher points out:

"The statements must be of such a nature as to be part of the transaction. They must naturally accompany the act, or must be of such a nature as to unfold its character or quality."

Continuing:

"It is elementary that an agent cannot bind his principal by declarations which are merely his-

torical, and which have no connection with any transaction then being conducted by him with authority for his principal. 'The principle of the exclusion (of such evidence) is the same as obtains in the ordinary relation of principal and agent. The statements of the latter are inadmissible to affect the former, unless in respect to a transaction in which he is authorized to appear for the principal, and he has no authority to bind his principal by any statements as to by-gone transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties.' ''

Now the cases are in unanimous support of that last [696] stated proposition. We have enumerated a number of them in our memorandum and I won't stop to read them all here. [697]

Now the evidence here shows that at the very most that Mr. Ragland was a sort of salesman who was attempting to have his superiors approve of plaintiffs as distributors or Flintkote tile. Mr. Ragland was present on many occasions, but exercised little or no authority or discretion on the question of whether or not to sell or refuse to sell tile to plaintiffs, or upon what terms or conditions sales would be made. It is clear, therefore, that plaintiffs failed to entroduce evidence tending to establish even the first elementary requirement for attributing an agent's declarations to his principal; there is no proof that Mr. Ragland was authorized,

expressly or impliedly, to make the statements in question or even statements of that same general nature.

Further, there is absolutely no evidence as to the nature of the occasion when the declarations by Mr. Ragland are supposed to have been made. All he said, literally all he said, was that "Mr. Ragland came into the office, met me at the office." The witness, Mr. Lysfjord, did not relate a single transaction which occurred at that meeting with Mr. Ragland. For all the record shows, Mr. Ragland appeared at the Bell office, made the alleged statements, and left. Therefore, there is no evidence from which it reasonably can be inferred that at the time Mr. Ragland made those statements he was engaged in any transaction for his principal, The Flintkote Company. [698]

It thus appears that before an agent's statement may be attributed to his principal on the theory of the admission of a party, it must first be established that the declaration was within the scope of the authority conferred upon the agent by the principal. Defendant submits that the quoted testimony of Mr. Ragland was admitted in evidence before an adequate foundation is laid. Defendant further states that that defect was not subsequently cured, and accordingly, the testimony should now be stricken.

There is, of course, no evidence to the effect that the employee, Mr. Ragland, was a general representative of defendant. Defendant further contends that the evidence does not permit an inference of

such authority as would encompass the making of the statements which have been characterized as admissions. Plaintiffs have adduced very little in the way of evidence as to the scope of Mr. Ragland's authority. At page 340 of the Reporter's Transcript, Mr. Lysfjord testified that Mr. Ragland told him, "I will do everything in my power to get acoustical tile for you because I think you would do a good job for us but I can't tell you anything at this time one way or the other." Again, at page 341 of the Reporter's Transcript, Mr. Lysfjord testified that Mr. Ragland "called me one day and said that he had been able to interest his company in the fact that I would like to have acoustical tile, and if I would be interested he would like to [699] introduce me to a Mr. Baymiller." Other testimony which also shows the narrow limits of Mr. Ragland's authority, either as to him or in relation to other agents, appears in the Reporter's Transcript at pages 40; 340; 343; 349, line 3; 355, lines 2-5; 358, lines 9-14; 385 and 386.

When one considers the nature of the declarations it becomes clear that as a matter of law it can be said that they could not have been within the scope of Mr. Ragland's proved authority. The declarations clearly are narrative in form and historical in nature. They relate to a meeting held at least a week prior to their narration. Obviously they concern a "by-gone" transaction, and could have no relation to any pending transaction, for the evidence does not disclose that a transaction of any kind was in progress at that time. [700]

Accordingly, in view of the fact that the foundation was and remains inadequate to permit reception of the evidence on the principle of admissions of a party, those declarations are, as a matter of law, not competent admissions of The Flintkote Company.

The admissibility of the challenged testimony must stand or fall, therefore, on whether or not it comes within an exception to the hearsay rule, for undeniably it is hearsay testimony.

Preliminarily, it should be pointed out that the phrase "res gestae" as used in the quotations from Section 1078 of Wigmore on Evidence and the Moran case, has no relation to the doctrine of admissions. As there used the term refers to an exception to the hearsay rule. This point was made by the court in Lane v. Pacific Greyhound Lines, 26 Cal. 2d 582, 160 Pac. 2d 21 (1945) when it stated as follows:

"* * * Hence, a spontaneous declaration made by an employee may be admissible against his employer as an exception to the hearsay rule pursuant to the rule under discussion separate and apart from the question of whether it was made in the scope of employment. There may be situations where they are admissible under both theories or under only one or the other. As pointed out by Mr. Wigmore (VI Wigmore on Evidence (3rd ed.) §1756a), [701] in quoting from the dissenting opinion in Snipes v. Augusta-Aiken Ry. & Electric Corporation, 151 S.C. 391 (149 S.E. Ill. 115):

" 'There is quite a good deal of confusion of

thought and lack of discrimination manifest in the treatment of the subject of the admissibility of declarations of an agent. The lack of discrimination and consequent confusion of thought is demonstrated by the failure to differentiate between the declarations of an agent which are part of the res gestae and those declarations which were made in the course of his employment, and while the matter in controversy was actually pending. The declarations of an agent, which are shown to have been a part of the res gestae, are admitted, not because he was an agent, but because they come within the class of excepted hearsay evidence which fulfills the requirements of the res gestae rule; the declarations of one not an agent would be received under the same conditions. The declarations of an agent made within the course of his employment and while the matter in controversy was pending, are admitted, not because they were made as a part of the res [702] gestae but because they were made under the circumstances stated. They would be received weeks or months after the episode inquired into, provided that they were made under those circumstances. They may utterly fail of complying with the rule of res gestae, and still be admissible upon the entirely different foundation. It is misleading and incorrect, manifestly, to hold that, before the declarations of an agent can be received, they must be shown to have been both a part of the res gestae and within the course of his employment. They may have been either or both, and admissible for that reason.' ''

Now, it was suggested at the time that this testimony was allowed in evidence that it was being offered as an overt act in furtherance of the conspiracy, and that the declarations were a part of the res gestae of the alleged conspiracy itself.

Now, these two suggestions appear to be but different facets of the same theory and apparently they proceed upon a theory that the declarations come within some exception to the exclusionary hearsay rule.

Upon careful analysis it appears that the evidence is not admissible upon any such theory. The declaration, [703] standing alone and not as a part of any transaction, as it must under the evidence, in no way furthered the objects of the alleged conspiracy.

Webster's New International Dictionary, Second Edition defines "furtherance" as:

"Act of furthering, or helping forward; promotion; advancement; progress."

Substantially the same meaning was given the phrase in People v. Smith, 151 Cal. 619, 626.

The court defined it as follows:

"A declaration, statement, or act of a conspirator to be admissible as in 'furtherance' of the conspiracy, must, as the word 'furtherance,' ex vi termini, imports, be an act, statement, or declaration which in some measure or to some extent, aids or assists towards the consummation of the object of the conspiracy."

Manifestly, as a matter of law it cannot reasonably be said that the statements themselves were

in furtherance of the conspiracy. On the contrary it would seem that revealing the conspiracy to the intended victims would tend to frustrate its objective.

Moreover, it has frequently been said that mere narrative declarations by co-conspirators are not competent for the reason that they are not ordinarily in furtherance of a [704] conspiracy.

Logan v. United States, 144 U.S. 263, 309, 12 S.Ct. 617, 632 (1892);

Mayola v. United States (C.C.A. 9th, 1934) 71 F. 2d 65, 67;

United States v. Food and Grocery Bureau of Southern California (D.C., S.D. Cal., 1942) 43 F. Supp. 966, 970.

As we have already pointed out, these declarations are pure narrative, entirely historical in character. Therefore, their utterance by Mr. Ragland could not in any sense have furthered the alleged conspiracy.

Defendant contends that Mr. Ragland's declarations cannot be considered as part of the res gestae of conspiracy. The term "res gestae" is not so elastic. Black's Law Dictionary, Third Edition defines the term as follows:

"Things done; transactions; essential circumstances surrounding the subject. The circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character."

Again, in St. Clair v. United States, the court

quoted with approval from Wharton on Evidence as follows:

"'The "res gestae," ' Wharton said, 'may be, therefore, defined as those circumstances which are the undesigned incidents of a particular [705] litigated act, and which are admissible when illustrative of such act.' "

The meaning of "res gestae" was fairly put by the court in People v. Perkins, 8 Cal 2d 502, when it said:

"(W)here it is the event speaking through the person and not the person telling about the event, * * * such declarations are part of the res gestae and admissible in evidence."

It cannot be said that a conspiracy is an event or an act. Certain conduct, either acts or declarations, it is true, may be said to be in furtherance of a conspiracy, and declarations at the time of the acts may constitute a part of the res gestae of that particular act, but a narrative declaration as to past events, standing alone, illustrates nothing. It clearly is a case of a person telling about an event rather than an event speaking, in part, through a person's declarations. It follows that the declarations by Mr. Ragland may not find their way into evidence under the guise of the "res gestae" of conspiracy.

Finally, it has been suggested that declarations are admissible on the ground that he, Mr. Ragland, is a conspirator. The suggestion was ambiguous and could have been any one or all of the following three possibilities: (1) that Mr. Ragland and The Flintkote Company conspired together; (2) that

Mr. Ragland conspired as an individual with [706] the acoustical contractors; and (3) that Mr. Ragland so conducted himself as an agent of The Flintkote Company as to be personally liable for his acts as agent of The Flintkote Company.

It is well settled that a conspiracy cannot exist between a corporation and its employee or agent acting as such. Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911.

There is no evidence that Mr. Ragland acted at any time otherwise than in his capacity as an employee of The Flintkote Company.

Nor is there evidence that Mr. Ragland conspired with any of the acoustical contractors in his individual capacity. Obviously, then, his acts and declarations cannot be admitted as acts or declarations of a conspirator on that theory.

There is no evidence that Mr. Ragland's position with The Flintkote Company was such that, or that Mr. Ragland did any acts which were such that, he would be personally liable under the antitrust laws for his acts done as agent of The Flintkote Company. It is therefore obvious that Mr. Ragland cannot be considered as a co-conspirator on that theory.

Even if on some theory not heretofore considered, Mr. Ragland could be considered as a co-conspirator with defendant The Flintkote Company, his acts and declarations are not admissible to bind defendant The Flintkote Company until such time as the participation of defendant Flintkote is shown by [707] acts or declarations other than the acts

or declarations of the alleged co-conspirators. There is no competent evidence showing such participation.

It is further submitted that Mr. Ragland's declarations, which are inadmissible on any agency theory, are not rendered admissible merely by denominating Mr. Ragland a co-conspirator with The Flintkote Company. There is no evidence in the record that at any time Mr. Ragland acted or conducted himself otherwise than as an employee.

In conclusion, defendant submits that the challenged testimony of Elmer Lysfjord should be stricken from the record on the grounds that plaintiffs failed, as a matter of law, to establish a foundation which is adequate to permit the declarations to be attributed to The Flintkote Company, and that the declarations are entirely hearsay and come within no known exception to that rule.

Defendant The Flintkote Company maintains that absent the challenged testimony of Elmer Lysfjord there clearly is no substantial evidence which directly or indirectly tends to prove that The Flintkote Company knowingly participated in an unlawful conspiracy when it refused to sell acoustical tile to plantiffs, even if it be assumed that such refusal resulted from pressure.

Accordingly, there being no proof of knowing participation in the conspiracy by The Flintkote Company, and that being the [708] only theory deducible under the evidence for finding that The Flintkote Company joined an unlawful conspiracy,

it follows as a matter of law that an essential element of plaintiffs' right to recover under the antitrust laws has not been proved, and defendant's motion for a directed verdict should be granted.

Now, specifically as respects the motion to strike much of this, it would seem to us, would follow the same grounds, because if there is no connection with The Flintkote Company proved, to go to the jury, it follows just automatically that, there being no connection proved, all evidence of alleged acts and declarations of alleged co-conspirators are not binding on the company and must be stricken.

Therefore, we urge, in support of our motion to strike, not only that the hearsay testimony of Mr. Ragland and the hearsay testimony of Mr. Waldron, heretofore discussed, but that all testimony relating to alleged acts and declarations of alleged co-conspirators, specifically the testimony of Messrs. Waldron and Lysfjord regarding the alleged activities of the Downer Company, all documents and records introduced in evidence relating to those activities, all testimony of the alleged co-conspirators, the acoustical tile dealers should be stricken on the ground that those are all acts and declarations not occurring in the presence of The Flintkote Company, not binding on this defendant, until competent evidence has been introduced to prove the connection with The Flintkote Company. [709]

Now lastly and independently of the matters which we believe stand or fall on the same ground of course comes this matter of the admissibility of

damage testimony. And at this time we must renew our motion to strike all evidence of alleged damage sustained by reason of alleged failure to supply tile subsequent to July, 1952, when the complaint in this action was filed. And in support of that proposition we again rely on the Connecticut case, Connecticut v. Frankfort Distillers, 101 F. (2d) 79, and Frye & Sons v. Cudahy Packing Company, 243 F. 205.

We further move for a directed verdict on the ground that the fact of damage has not been proved in this case by any competent evidence.

Mr. Ackerson: Your Honor please, I have submitted two briefs which touch on these motions argued by Mr. Black.

Mr. Black stated a basic question here. I think the basic question in this Circuit, and in many Circuits, but certainly here in connection with the motion for a directed verdict is simply this: It is not is there substantial evidence in the record (which I think there is), but is there any evidence, any competent evidence in the record, from which the jury could infer that the defendant Flintkote aided, joined in, or abetted an illegal facet or aspect of the conspiracy with knowledge of that aspect.

I have argued in the briefs, and I think the cases are [710] clear, that in order to tie in a co-conspirator he doesn't have to know all about it, he doesn't have to know all his co-conspirators, nor does the plaintiff in a case like this necessarily have to name all the co-conspirators.

Mr. Black mentioned the fact that Mr. Ragland

apparently was a co-conspirator under the plaintiffs' theory because he conspired with The Flintkote Company, because he conspired with himself. Well, of course that isn't true. That isn't our position at all, your Honor.

Mr. Ragland is a co-conspirator as an agent of The Flintkote Company. And how do we know that? There is no act The Flintkote Company performed in this entire matter that wasn't performed in part by Ragland, in part by Baymiller, in part by Thompson.

Now let's skip over these preliminary conversations. Who terminated these plaintiffs? Certainly it was Flintkote. But there wasn't one scrap of writing from any other official of Flintkote or from any official of Flintkote. Flintkote acted through Ragland, Baymiller and Thompson. They walked out to the plant of my clients and they said, "We will no longer sell you tile." That is all there was to it.

How does Flintkote act, if Ragland, Thompson and Baymiller didn't have authority to act?

We certainly lost our line of supply because of the action of these "unauthorized, wholly disconnected subordinate [711] employees." I say that we start from there.

Now let's see what these statements are. We are not concerned here with whether or not Flintkote is liable on a contract, we are not concerned as such with ultra vires, technical ultra vires acts of an agent of a corporation. We are concerned here, your Honor, with circumstantial evidence of purpose and motive on the part of Flintkote in terminating this

source of supply. A part of that circumstantial evidence as to purpose, we contend, relates to the circumstances behind these protests of our plaintiffs' competitors.

Now I pointed to authority in the briefs, and I am not going to find it or repeat it, but Flintkote doesn't have to be benefited by this in order to show by circumstantial evidence that it aided and abetted this conspiracy to put my clients out of business for the purpose of eliminating their competition with their competitors. Flintkote doesn't have to be a competitor of my clients. Flintkote doesn't have to even benefit. But if we can believe, and there is no reason for not believing it, there is no contradiction to the statements in evidence at this time; the sole question is as to their admissibility. There is no evidence other than Flintkote did receive these protests and threats. Flintkote did shortly thereafer terminate the supply of my clients. Let's leave the hiatus between those two statements there.

That is the inference the jury must draw. But it is [712] circumstantial evidence. Mr. Black says, well, we haven't any written proof that Mr. Ragland had a right to make those admissions. Certainly we haven't. But we do have the undeniable proof that Mr. Ragland did, in fact, act for Flintkote and that is the only way Flintkote could act. Why could Mr. Ragland, along with Baymiller and Thomspon, the trio, terminate this source of supply without any written instrument from any other person than Flintkote and not be authorized to make an admission of circumstantial evidence of

coercion, which the plaintiffs claim and which is shown by the evidence to be the very purpose of the termination?

I think the cases are clear, and I think I have cited them, your Honor. Evidence is always admissible to show purpose and intent. You can't have a written admission on that. We can't show that through a written letter from the president of Pioneer-Flintkote to Ragland, that you have a right to go and tell this. That is an admission. An admission is always an admission of a past act. These past acts—and I think this is the only question involved—these past acts that Mr. Black objects to so strenuously are an admission, or constitute an admission, according to the plaintiffs, of the motive and purpose of Flintkote in having this conspiracy. In other words, the coercion that we say motivated it.

Now it is up to the jury to decide whether there is a connection there. I think they are clearly admissible. [713]

Let's take a little chronology here. I am going to refer to this one brief I have filed. There is no dispute about this coercion having been exercised upon Flintkote. There is no dispute about that. I think, as I stated, that Mr. Black said that he wouldn't seriously dispute that these competitors of the plaintiffs came down to The Flintkote Company and objected to their being in business. At least he admitted there were objections. [714]

The testimony shows beyond a doubt that there were objections.

Now what is the relevancy of that admission in this testimony? I don't care whether it is by admission of Ragland, it is an admission. Ragland could be, and it has been shown to be, what is ordinarily in criminal cases called an unnamed or unindicted co-conspirator. You have those people brought into cases who weren't even in the business, had no interest in it at all. They may have been a truck driver. And I can cite the case by Judge Wyzanski in Massachusetts within the last six months who handed down a decision involving the cranberry merchants there. And they convicted —they didn't convict them; they got a judgment— against the banker for co-operating with the cranberry association to injure this man's business.

The question then for your Honor, the basic question—and let's get back to it—is this: Is there any, any, admissible evidence in this record to go to the jury? I don't think there is any doubt about it. If we just limit it to the termination meeting—Mr. Black didn't mention that—and I assume it is obviously an overt act in furtherance of something. The question is whether or not there is evidence here from which the jury can infer that that termination was the result of Flintkote's tacit agreement with these contractors to restrict plaintiffs competition. [715]

So we start out with the admitted fact, they did object. Flintkote admits that. The testimony shows that.

We start out with the next fact, as I have stated,

that very shortly thereafter we were terminated in the manner I have stated.

We have the further testimony, your Honor, which is background and purpose again, that in these early conversations—and it isn't disputed so far—let Mr. Black dispute it later on. He has Messrs. Ragland, Baymiller and Thompson to bring in here. But these early meetings the fact that there would be this coercion was expressly called to these gentlemen's attention. They were forewarned.

I can't see any question as to the admissibility of that type of evidence, as well as Ragland's admissions.

Mr. Black hasn't mentioned the prior conversations, either. He hasn't discussed them at all. He has limited his discussions to Ragland's admissions to Lysfjord and to Waldron, by the way, that Mr. Newport, one of the competitors, president I believe or owner of Coast Insulating Products, met with Mr. Harkins and threatened to spend $50,000 to boycott Flintkote's products if they didn't cut them off. That was one conversation.

If I conspired to commit a larceny or to commit a murder and subsequently I admitted that I was in the area of that crime, either crime, is there any doubt but what that would [716] be admissible, if there was any substantial—not even any substantial—any admissible evidence, to connect me with the other members of the conspiracy, anything from which an inference could be drawn? Of course it would be admissible [717]

We have more than that. We have the entire—

I am not going to review the whole matter, your Honor, I have set it out in my brief—we have knowledge, proven knowledge on the part of Flintkote from which the inference is inescapable that Flintkote knew that their tile was the only tile available to the plaintiffs.

Why all the negotiations if other tile were available? But it goes beyond that. The evidence shows that Flintkote distributes its tile to this party, that party, the other party; that Armstrong did the same thing.

When the evidence is analyzed, every available competent source of tile was in the co-conspirators' control.

The inference is further inescapable, so far as knowledge of Flintkote goes, your Honor, and based upon that premise of the evidence along that line, they had to know. I don't think this jury is going to miss the inference that when Flintkote terminated these plaintiffs, unless they have an independent business excuse, wholly disassociated from the inference of agreement, tacit or otherwise, with one or more of these acoustical tile contractors, unless they can eliminate that inference entirely they have been shown to have knowledge. And I don't think there is any doubt but what the inference could and should be drawn.

Now, I would like to refer, your Honor, call your Honor's attention to these cases in the last brief I filed [718] with your Honor yesterday. The amount of evidence that was required in the Moreno case and the other cases cited there——

The Court: The Moreno case was not an antitrust case.

Mr. Ackerson: No, it was merely a conspiracy case. I don't concede that there is any difference in the general principles involved in a conspiracy case than an antitrust case, unless perhaps, under recent broadening, the antitrust decisions may be even broader than the criminal conspiracy cases.

The Court: You are going to take a little while longer and I suppose Mr. Black will want to reply.

Mr. Black: Briefly.

The Court: Do you think we ought to send the jury home?

Mr. Black: Yes.

Mr. Ackerson: Yes.

The Court: Is it agreeable to have the bailiff go up and tell them they are excused until Monday?

Mr. Ackerson: Yes.

Mr. Black: Yes.

The Court: The jury is excused until Monday at 1:30.

Mr. Ackerson: As I was saying, I don't believe there is any difference unless perhaps in a civil antitrust case, when we know, certainly, recent decisions have either broadened it or recognized past principles of conspiracy in a wider scope. [719]

You have, for instance, what has purportedly started out with your Interstate Circuit Theatre case a number of years ago down in Texas. There you had a dominant exhibitor who obtained unilateral contracts with each of the distributors.

There was no showing whatever that any dis-

tributors got together. There was no showing at all, for instance, that Columbia was threatened by Warners if they didn't come in, and yet the Supreme Court held the basic principle, that anyone who knowingly aids, abets, furthers, becomes a co-conspirator.

That case was based on pure unilateral action, which is a more difficult problem than we have here. The only question here, your Honor, is to judge the hurdle between the threat and the termination, if the jury infers from all the evidence, and the evidence includes more than that.

That was the purpose, your Honor, of introducing the fact these plaintiffs had a house here first. They quit a twelve or fifteen thousand dollar a year job and then deliberately came into Los Angeles and opened it up here first. Those are circumstances.

They put in a telephone here first. They signed a lease two or three weeks ahead of San Bernardino. There are a hundred pieces of circumstantial evidence in this case, your Honor, from which the jury could infer an agreement, tacit [720] or otherwise, with one or more of the acoustical tile contractors to throttle the plaintiffs' business.

Now, Mr. Black said, or, referred to the fact, and I have already averted to it by reference to the Cranberry case, but, as I recall Mr. Black's argument, he seemed to infer there could be no conspiracy inferred from the fact that Flintkote was coerced by one or more conspirators to restrain the trade of the plaintiffs.

I think that if Mr. Black meant that, that it is

so contrary to established law, it doesn't make any difference whether you willingly join. It doesn't make any difference whether you willingly or are coerced into it. I have cited two——

The Court: Wasn't his point there that his company cannot be bound by this evidence to have joined, but it was just pushed around by the conspiracy, that the conspirators came around and said, "Now, Flintkote, do this," and Flintkote yielded to its pressure, but did not merge into it.

Mr. Ackerson: Flintkote yielded and did what they were told, but they didn't agree to what they were told, was the way I get the gist of the argument.

I only cited one, your Honor, but there must be a score of cases on that point, but in the Paramount case, as I pointed out, that very question arose and it was probably true there. [721]

The Court: Well, I think grudging entry into a conspiracy is no excuse. Of course, it must be shown that Flintkote did enter the conspiracy, but if they entered it, it doesn't make any difference if they did so reluctantly or willingly.

Mr. Ackerson: Well then, I won't cover that, your Honor. So then we get down to the point of this single defense in this case, and it goes to the relevancy of, I say, all the evidence that Mr. Black has averted to, and that is this:

As I recall Mr. Black's partial opening statement, he won't deny this and he won't deny that, but he denies the conspiracy.

His defense, as I take it, from whatever is in the

record to date, is "that in spite of the protests we acted independently from sound business judgment, without any reference to any pressure or agreement with anyone else."

Is that the purported defense, Mr. Black, in substance?

Mr. Black: It overstates it, and thereby becomes inaccurate.

Mr. Ackerson: You may correct that. In any event, the whole question, your Honor, boils down to this: Why?

Why did Flintkote do it? Because it followed along with the urgings of the contractors, through tacit agreement or through coerced agreement, or did it have a logical business motive; the sole purpose of the termination being a [722] logical disconnected business motive.

How do you disprove such a thing, your Honor? By circumstantial evidence. What the plaintiffs did, what Flintkote did and why it did it.

The admissions of Ragland, as to what the contractors did to Flintkote, certainly, bears in a very relevant way on the purpose of Flintkote's entire acts. It bears as a connecting piece of evidence that Flintoke, as an aider, abettor, joiner in a conspiracy, was to put these plaintiffs out of business.

I can't see from the evidence, and I don't think Mr. Black has stated any actual facts that would mitigate against the fact that Ragland was—in fact, that Ragland was, in fact, acting for Flintkote. And when Ragland continued to act for Flintkote—and we don't need to distinguish Ragland—there was

Thompson and Baymiller, too, but when they continued to act for Flintkote, from the time of the very first negotiations down to the effective overt act, then I don't think even Mr. Black will deny that is an overt act, of terminating the plaintiffs' supply of tile. [723]

Then I don't know what stronger circumstantial evidence you would need of an agent, unnamed, unindicted co-conspirator, if your Honor pleases, acting with authority and in behalf of the corporation.

Other than that, your Honor, I will rest on the basis of the authorities I have cited in the two briefs.

Mr. Black: I will be very brief, your Honor.

The Court: Take whatever time is required.

Mr. Black: It is not our position, the court please, that it is necessary, in order to prove authority of an agent, to show a resolution of the board of directors or that that act was a corporate act, done with the solemnity of making a basic agreement.

But we submit that there is absolutely no dissenting case on the books from the proposition that before a declaration of an agent, as to a past transaction which otherwise would be clearly hearsay, can be admitted, it must be proved that the agent was authorized to make that statement, or that he was then engaged in some transaction upon the authority of his principal, as to which that statement is a necessary part.

The only evidence in this case is that Ragland

came down, Ragland said. There is nothing else. There is no evidence whatever that Ragland was then engaged in any transaction, to which the narration of an alleged meeting between some acoustical tile dealers and another Flintkote employer [724] a week or so before could conceivably have any bearing on what purpose of the company was then being affected.

The cases we have referred to on this agency doctrine are absolutely in point, without the possibility of any distinction. Therefore, it gets down to this: That the only evidence that tends in any way to show anything in the nature of an agreement, concert or illegal methods in the case is this isolated bit of hearsay, based upon an alleged meeting, at which somebody is supposed to have said, "If Flintkote doesn't stop these people we will boycott them," and in which there was supposed to be a meeting of all but one of the Flintkote customers.

Now, the only other evidence of such an event, obviously, would be to produce the participant or one of them who was present.

There can't be any question but what Ragland's statement that this thing occurred last week is hearsay. And to get it into evidence, therefore, it must be in as one of the proper exceptions to the hearsay rule, namely, the authority, at least a statement by an agent with the authority of his principal.

There is no use reiterating those cases again,

because they are spelled out in our memorandum, the Court please.

Take away this inadmissible evidence as to this alleged meeting, and what do we have left? Nothing but statements [725] that there was pressure, that dealers complained.

Now, with that in the case you have a situation which is precisely parallel to the case of Johnson v. Yost, which we referred to before, but the applicable parts of which I wish to call to the Court's attention. That is 117 Fed. (2d) 53.

In that case the Court will remember that there was an admitted conspiracy of all the lumber dealers to drive out one of their number from the field, because he was a price-cutter. [726]

That conspiracy consisted of an agreement to put pressure upon the wholesalers to refuse to supply this plaintiff with his basic necessities for his business. Pressure was, in fact, applied on a whole group of wholesalers. They, in fact, yielded to that pressure. They cut off the plaintiff and were joined as defendants.

The court held that there was clear proof of a conspiracy between the dealer, the court held that you couldn't possibly infer from those facts alone enough to hold the wholesalers.

Now in the language of the opinion at page 61—let me begin at page 60, your Honor:

"* * * It is not alleged nor claimed by the plaintiffs that these defendants had anything to do with the organization of the alleged conspiracy."

Now certainly not in this case is there any charge that Flintkote set up any group of acoustical tile dealers.

"The conspiracy charge against them is based on an alleged agreement not to sell to plaintiffs had between them and certain dealers."

That is based upon an agreement among the wholesalers.

"It is not based upon any agreement between the defendants themselves. There is no direct evidence of any agreement between either of [727] these defendants and the dealers——"

Nor is there here. There is no direct evidence of any agreement between Flintkote and the other acoustical tile dealers to put the plaintiffs out of business.

"——but such agreement is sought to be shown by circumstantial evidence. It may be gathered from the pleadings and the argument of counsel based upon the evidence, that plaintiffs base their claim of proof of conspiracy upon the alleged facts (1) that these defendants simultaneously refused to sell to plaintiffs;"

That is the whole group of wholesalers refused to sell.

"(2) that they were deterred from selling by the pressure and threats of the lumber dealers; and (3) that they knew other suppliers were refusing to sell for the same reason.

"In the final analysis, the claim is that these defendants were coerced by defendant dealers, and as a result of that coercion they declined to sell plain-

tiffs. From this plaintiffs conclude that a conspiracy existed between all of the defendants. It must be borne in mind that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for [728] good cause or for no cause whatever. The Clayton Act itself specifically provides: 'That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.'

"The combination and conspiracy charged against the lumber dealers was a combination to deflect the natural course of trade. Such a combination is not only an unlawful invasion of the rights of the parties at whom the concert of action is aimed, but also of the parties who are to be coerced into refusing business relations with them. Assuming that plaintiffs were customers of the supplier——"

That is the wholesale group.

"——the combination of the lumber dealers was directed to preventing plaintiffs from having business relations with the supplier defendants."

So here the contention is that these acoustical tile dealers conspired to prevent plaintiffs from having further relations with the defendant Flintkote.

"This combination prevented these defendants from selecting their own customers. The decisions of the Supreme Court abound in expressions [729] to the effect that, 'The trader or manufacturer, on

the other hand, carries on an entirely private business and may sell to whom he pleases.' From the mere fact of refusing to sell to plaintiffs there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers. (Citing about 15 cases.)

"There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion. Here, it appears that a number of these defendants——"

That is the wholesale group.

"——had already refused to sell these plaintiffs even before the date of the alleged conspiracy. Others thought it bad business to sell them, and as plaintiffs themselves alleged, these defendants were coerced. Where there were two dealers in the same product at the same city, it was not thought good business to sell to both plaintiffs and the other dealer. In most instances, the other dealer had been handling the products before the arrival of [730] plaintiffs. In some cases, plaintiffs had invaded the trade territory of established dealers handling products of these suppliers, and that was at least distasteful to these defendants and there seemed to have been ample reason of a business character for the suppliers to refuse to sell to plaintiffs." [731]

"In Federal Trades Commission v. Beech-Nut Company * * * the court held that the facts found went beyond the simple refusal to sell goods to persons who could not sell at stated prices. The court particularly pointed out that under the Sherman Act a trader was not guilty of violating its terms 'who simply refused to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.'

"We have already referred to the rejected evidence. None of this was of such a character as to affect the liability of the supplier defendants. As to them, the proffered evidence was not material. There is here no substantial evidence introduced or proffered that these defendants have gone beyond the simple refusal to sell their goods for reasons which were sufficient to them and which appeal to one as having substantial basis in reason. While their acts in refusing to sell were similar——" [732]

In this case, of course, in the Yost case, there were a whole group of wholesalers that would do the whole thing, which is completely missing here.

"——yet a fair and logical inference from the evidence is that as pressure was brought to bear on them, they from business necessity and self-interest declined to sell to plaintiffs. As to some of these defendants there were other reasonable explana-

tions, but liability on their part could only result from a knowing participation in the combination of retail dealers. There is no evidence, direct or circumstantial, showing such knowledge. It was not enough to establish a cause of action against them to show that there was a conspiracy among the lumber dealers to prevent plaintiffs from securing supplies sold by this group of defendants, in the absence of evidence that these defendants knew there was such a conspiracy. They refused to sell plaintiffs because they feared such act would displease their other customers, causing loss of their business. They perhaps knew that other suppliers were refusing presumably for like reasons.

* * *

"So here, the refusal of the supplier defendants to [733] sell to the plaintiffs may have furthered the object of the conspiracy charged, but it did not prove that the suppliers knew of the conspiracy.

"It follows that the court correctly directed a verdict in favor of the supplier defendants. The judgment appealed from is therefore reversed as to the retail dealers, and the cause is remanded, with directions to grant plaintiffs a new trial as to said defendants, and as to the supplier defendants the judgment appealed from is affirmed."

Now we submit that that case is on all fours with this one.

Mr. Ackerson: May I say just one word that was brought up by Mr. Black's remarks?

The Court: Yes.

Mr. Ackerson: I will make it very brief, your Honor.

This is in reference to—and I probably covered it; I merely want to state it a little differently—Mr. Black has said, as I understand it, that these conversation reported by Ragland were not acts in furtherance of the conspiracy. If that is right, I think it is obviously an error. They were the beginning of this conspiracy insofar as it affected the plaintiff's business.

I still don't know of any rule of law that says that a conspirator who would be bound by those acts later if he did [734] join later, couldn't admit the overt acts of a co-conspirator—I am talking about Howard, Coast and Newport and Gus Krause—so that if it is shown that there is sufficient evidence to show from which the jury can infer, any evidence from which the jury can infer, that Flintkote joined later, certainly the admissions of Ragland related to the acts of these competitors in the furtherance of the conspiracy and they initiated whatever pressure was made.

That is merely an added thought, your Honor. And along that line, the admission of this pressure, these overt acts by the plaintiffs' competitors, was reiterated at the termination meeting as part of the res of the termination meeting. Ragland admitted—I don't mean Ragland, Baymiller I believe it was—in response to Mr. Waldron's question of a terrific pressure having been brought, stated, yes, there was pressurse, there was pressure.

I merely wanted to make that one added statement, your Honor.

There are a hundred cases that bear somewhat on this, Clune v. United States, clear back in 159 U. S. 590, Eisenhower v. United States 236 Fed. 842, Reeder v. United States, cited in the Eisenhower case, Green v. United States, a Ninth Circuit case, and many others, including the Marino case, though I think the rest of them have been added, but I appreciate the privilege of making this final statement. [735]

The Court: In connection with that Marino case, it contains practically every rule applicable to conspiracies.

Mr. Ackerson: Yes, it does. It sort of covers the field.

The Court: In fact, I had a stipulation from counsel in one case that the instructions to the jury on what constituted a conspiracy could be taken from the Court's definition of conspiracy in the Marino case, just using the Marino case language.

I think it would be provident to adjourn the formal proceedings and for the Court to review these cases and transcripts over the week end and rule on these motions Monday.

Mr. Ackerson: Very well.

The Court: So we will do that, and we will have a ruling on Monday at 1:30 when we reconvene.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 1:30 o'clock p.m., Monday, May 16, 1955.) [736]

May 16, 1955—1:30 o'Clock P.M.

Mr. Black: If the Court please, we received about 11:00 o'clock this morning this letter memorandum from Mr. Ackerson. I would like to have about three or four minutes to say something in reply to it, if the Court would hear me.

The Court: Yes?

Mr. Ackerson: I would like to have three or four minutes to say something basic, which I believe to be basic, Your Honor, which was not included in the letter.

The Court: You say it first and then Mr. Black can answer both at one time.

Mr. Black: Very well.

Mr. Ackerson: First of all, Your Honor, this Johnson case, I think we ought to analyze that a little bit, and that will lead up to the ultimate point I am going to make.

First of all, as I see that case, if you analyze it carefully, according to my opinion, Your Honor, it holds this, that the mere fact—and I quote "mere"; that appears on page 60 at the bottom of the last column—the mere fact of refusal may not give an inference to a conspiracy.

I would like, Your Honor, to have you think of this word "mere." I might state now the main purpose of my letter this morning related to the admissibility of the evidence sought to be stricken, but since the Johnson case was mentioned [738] I would like to say a few words on that.

The first conclusion I draw is this, that the Court

merely held that evidence in that case did not rebut the proposition that individual, independent action was not possible. But here is the difference in the two cases: Mr. Black is urging that a person has a right to choose his own customers. We don't disagree with that at all. Of course he does. In the Johnson case, I believe if Your Honor reviews the evidence, and so forth, you will find that in accordance with the language on page 61 the Court said "there must be substantial evidence."

Now this is an Eighth Circuit Court ruling and I believe, Your Honor, that in this District there can be any evidence from which an inference can be drawn.

But any way the Court there said:

"There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion."

I don't think we are confronted with that situation here. [739]

To continue the quote:

"Here it appears that a number of these defendants had already refused to sell plaintiffs even before the date of the alleged conspiracy. Others thought it bad business to sell them and, as plaintiffs themselves allege, these defendants were coerced. Where there were two dealers in the same product at the same city it was not thought good

business to sell both plaintiffs and the other dealer. In most instances the other dealer had been handling the products before the arrival of plaintiffs. In some cases plaintiffs had invaded the trade territory of established dealers handling products of these suppliers and that was at least distasteful to these defendants."

And we are speaking of distributor defendants now. And to continue:

"And there seemed to have been ample reason of a business character for the suppliers to refuse to sell the plaintiffs."

Then the Court goes on as follows:

"In Federal Trade Commission v. Beech-Nut Company. 257 U. S. 41, the Court held that the facts found went beyond the simple refusal to sell goods to persons who would not sell at stated [740] prices. The Court particularly pointed out that under the Sherman Act, 15 USCA, Sections 1 to 7, a trader was not guilty of violating its terms 'who merely refuses to sell to others. He may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not consistently with the fact go beyond the exercise of this right and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of the channels of interstate commerce.' " [741]

Now, under those facts, Your Honor, we have this situation, where the plaintiffs there moved into Grand Island, Nebraska, I believe it was, and they started a cut-rate store.

All the evidence, the type of evidence we are talking about, was admitted against the conspirators, held to be conspirators. The denials there were a matter of choosing a customer, not cutting one off that had been chosen, investigated and established. That is one point.

Now, there is a principle of conspiracy law, Your Honor—and I am sure Your Honor will recognize it—that a seller does have a right, not only to choose a customer, but he has a right to sit down and do nothing to stop a conspiracy. In other words, he doesn't have to take an affirmative act to stop the conspiracy, but he may not take an affirmative act to further a conspiracy. That is one point.

The other point is this, Your Honor: In the Johnson case it cites the Interstate Circuit case on one point, but the point is this, that stronger evidence being available and failure to produce it causes an inference that the stronger evidence would be detrimental to the defendant. It does not quote or cite the case for the basic reason the case stands for, and which has been followed in cases all the way down to the Theatre Enterprises case, which I am going to quote to Your Honor.

The Court: When? [742]

Mr. Ackerson: What is it?

The Court: When are you going to quote it to me?

Mr. Ackerson: Right now, if I may.

The Court: You asked for three minutes for something further and basic. I came in on Saturday

to read what had been cited to me on Friday, and spent substantially the day reading it.

I think these cases would be prepared by counsel before they ever came in to try them.

Mr. Ackerson: In the first place, Your Honor, they probably would have been but for the fact when Mr. Black stood up and filed his motions and I got them the same time you did. I didn't have a chance to think about his points and authorities. I didn't think he would have any that were substantial. I still don't think he has has.

But I haven't had a chance to think about them, except over the week end, either. I will try and be as brief as I can.

The Court: Let's hear from Mr. Black.

Mr. Ackerson: Very well.

The Court: All of these things should well have been treated in the trial briefs, which were due to be filed before the case began. They were due, I think under the Rule, ten days before. We didn't get them then.

The plaintiffs have relied largely on the testimony of [743] the plaintiffs themselves, and I should think that the plaintiffs' case could well have been analyzed fully and put before us before now.

Mr. Ackerson: We didn't know the defendant's position after numerous depositions, Your Honor, until we were in the middle of the trial, or it could have been.

Mr. Black: Well, I will try to say, in extenuation of our own position, if the Court please, a mo-

tion of this kind can hardly be made until the plaintiffs' case is completely in.

Until we know what it is in all of its ramifications, we are hardly in a position to discuss it, with fairness to the other side, because it all has to be in.

Well, all I wanted to say at this time, if the Court please, is to make two observations in connection with this memorandum of May 13th.

The Johnson v. Yost case is cited by counsel, in support of the proposition that admissions of corporate agents in that case, were received in evidence against objection, but the very nature of those admissions, received in that case, brings out to a high degree the difference between the factual picture in our case and the admissions that were received in the Johnson v. Yost case.

In that situation various agents, managers, officers, of the corporate defendants severally approached the plaintiffs [744] and individually announced their company was going to cut these people off if they quit dealing and were going to see to it that they didn't get any cement and direct threats of that nature.

It was argued that these particular agents didn't have authority to make those declarations. The Court points out, in discussing the evidence, as follows:

"Even though the making of declarations——"

I read from page 59, Your Honor.

"——may not have been expressly authorized by the principal, yet if they were ordinary incidents of the position which the agent occupies, authoriza-

tion will be implied. A person in a managerial position will be called upon, in the performance of his duty, to adjust controversies and to make and receive admissions. All of these things must be done or performed by someone, and a corporation must ultimately act through an individual. Each of these agents was charged with the continuous management of the business of his principal. The jury may well have concluded that the local managers for their localities were general managers. The subject of the conversations related in a vital way to the successful prosecution of the very business entrusted to them. As the [745] record now stands, we are of the view that they were acting within the scope of their apparent authority, and their declarations were binding upon the principals."

Now, let's review the facts just one moment to see who these agents were.

" 'The declarations relied upon as against the Yost Company were made by Martin and Rurup, the Local yard managers at Grand Island and Hastings, respectively; those concerning the Sothman Company were made by Goehring, the yard manager. The statements concerning the Geer Company were made by Russell Geer, its president and general manager, and the statements concerning the Chicago Company were made by Lawrence Simpson, its vice president and general manager.' These statements were all made in the course of conferences concerning the business of the corporations. All of these agents were general agents in charge of business, either locally or generally. As said by

the New York Court of Appeals in Lowenstein, 'Where an entire business is placed under the management of an agent, the authority of the agency may be presumed to be commensurate with the necessities of the situation.' " [746]

So the Court there points out all of these people were in managerial capacity. That they were all at the very time engaged in the transacting of business for the company and the corporate authority would be necessarily presumed from the positions they held.

Now, one final sentence, before I leave the Yost case. Counsel has just stated today that one distinction between that case and this is that there the parties had not been theretofore engaged in a course of dealing with the plaintiffs. Well, that just isn't so.

In the case, at page 59, you will find a quotation thus:

"In 1934, the Missouri Portland Cement Company advised plaintiffs that although business with them 'has been very satisfactory so far as we are concerned,' yet due to complaints from the dealers in Grand Island and Hastings, future business would have to be discontinued and all future orders were declined."

So that the case proceeds on the very basis that they were expressly told that they were going to stop dealing with them, because other people were complaining about it, and for the business reason of dealing with the customers, where they got the most business, they cut these people off. [747]

It was held that that was not a conspiratorial act and therefore that evidence alone had no tendency to show a conspiracy, and a directed verdict was sustained by the upper Court.

Now counsel also refers to Pan-American Petroleum Company v. United States, 9F(2d)—the letter miscites the case inadvertently, the letter says 161, the correct page is 761. It was the famous Doheny case in which, as against Pan-American Petroleum Company Judge McCormick admitted the statements made by Mr. Doheny before the Congressional investigation, and it was claimed that there was no authority proved on the part of Mr. Doheny to make those statements on behalf of the corporation.

Judge Gilbert in the opinion says, at page 769:

"There can be no question but that the declarations of an officer or agent of a corporation, even though they consist of a narrative of past facts, may, under appropriate circumstances, be admitted in evidence against the corporation, nor does the admissibility of such declarations necessarily depend upon the length of time that has elapsed between the occurrence and the declarations. Clearly if any officer of the defendant corporations was authorized to bind them by declaration after the event, it was Doheny. As president [748] of both companies, he had negotiated the agreements and had executed the same. The scheme to pay for tankage facilities, construction and fuel oil by Government royalty oil originated with him and Fall. He was the dominating figure and the administrative officer

by whom the business of the corporations was conducted, and acts done by him within the scope of the corporate powers were presumably duly authorized. At the time when the declarations were made, there was pending transactions between the plaintiff and the defendants to which the declarations were pertinent, for the contracts and leases were in active operation, and their validity was being investigated by the Senate committee. The defendants were interested in vindicating the contracts, and it was to their interest to show that the $100,000 transaction was a purely personal one, and in no way related to the procurement of the contracts. The declarations were also against the interest of the declarant, and no other means of obtaining the evidence were available to the plaintiff. Among the cases tending to support the ruling of the trial Court are Chicago v. Greer, 9 Wall, 726 (and a long list of other cases supporting the [749] authority in that decision)."

Now we submit, Your Honor, that that is now a comparable situation to this. There was the president of both corporations, and the very purpose of his appearing was in the business of the company and in explaining these transactions before Congress, and Congress, and quite properly the Court admitted those declarations against a claim that they were not made with authority by the corporations that Doheny at the time represented. As the Court points out, he was the alter ego of those companies, president of both of them, and was the very man to whom the entire business was entrusted.

Now in this situation on the contrary we have the alleged admissions of a salesman in the company at the time when it was not proved to be any transaction which he was then attending to on behalf of his company, and they related to a narrative of past events.

We submit that there is just no evidence of authority on the part of Mr. Ragland to make the alleged statements, and if they are stricken that nothing remains in the record from which a prima facie showing against the defendant may go to the jury.

The Court: Considering all the evidence before the Court, the motions to strike are denied and the motion to dismiss is denied.

Bring in the jury. We will stand in recess until they [750] come down.

(Short recess.) [751]

The Court: Call the case, Mr. White.

The Clerk: 14,350, Lysfjord v. The Flintkote Company, for further jury trial.

Mr. Ackerson: Ready for the plaintiff.

Mr. Black: May it please the Court, Mr. Ackerson, and ladies and gentlemen of the jury, the time has now arrived for the defendant to make its opening statement of the matters which it is expected it will prove in the defense in this case.

I wish to make the same admonition made by Mr. Ackerson, that what I tell you in this connection is not evidence. That will, of course, be confined to

the oral testimony and the documentary proof which will come in on the case.

My statement, therefore, is merely a summary of what we expect to prove as our version of the facts in this occurrence. I think it has been sufficiently pointed out that The Flintkote Company is a manufacturer. Perhaps it is not entirely clear. It does not do any installation business itself.

It is an acoustical tile contractor. It sells its products to the contractors. It manufactures various products, roofing materials, paper boxes, asphalt emulsions, insulating board, wallboards, and so forth. Acoustical tile is only one of the many products that are produced by this defendant.

This particular commodity, so far as the product handled by the defendant Flintkote Company is concerned, is a [752] tile manufactured from sugar cane fiber in the Hawaiian Islands.

The Flintkote Company went into this business in 1948 or thereabouts, when it acquired a company called Canex, which at the time was engaged in the manufacture of this type of acoustical tile.

When Flintkote started into business in this Los Angeles area, its policy at the outset was to sell it to any contractor who wanted it. This policy proved quite unsatisfactory.

It was decided thereafter to sell it only to a limited number of approved contractors. The first outlet chosen by the defendant Flintkote Company was the L. D. Reeder Co.

Then a little later that company suffered some

financial difficulties and The Flintkote Company terminated its relations with that company.

One at a time, the R. W. Howard Company, the Sound Control Company, and the Coast Insulating Company became Flintkote accounts, and these three concerns were the only ones in the local area that were handling the Flintkote line of acoustical tile at the time with which this litigation is concerned.

Flintkote decided to limit its outlet to three of the contractors, not by reason of any agreement with these contractors, but because these three were giving The Flintkote Company adequate local distribution.

This policy was being maintained at the time involved in [753] this litigation. And about May, 1952, Sound Control was replaced by Acoustics, Incorporated, as the third Flintkote contractor in the area.

It will be shown that various proposals were made to the Flintkote people, from time to time, to add additional accounts in the local area, and the Flintkote people universally rejected these applications, on the basis that the three distributors were adequately taking care of Flintkote's requirements in the local area.

One of the witnesses, whose name you have heard a great deal in the course of this case, is a Mr. Robert Ragland. He was employed by The Flintkote Company as a specialty salesman, at the outset, for fiberboard products, which did not include acoustical tile. [754]

He was later transferred to the acoustical depart-

ment and was given a position as a sales promoter. Mr. Ragland knew the plaintiffs in this case. He had worked together with them in the Shugart Company some years prior.

Along about the late summer or fall of 1951 Mr. Ragland was approached by Mr. Lysfjord with respect to the possibility of getting a Flintkote connection. The evidence will show that Mr. Ragland said that Flintkote was already represented adequately in the local area and that he didn't think there was much, if any, possibility of getting a connection for local distribution. He suggested the possibility of Phoenix, Albuquerque and Denver. He said he had no authority to make any decision, but promised Mr. Lysfjord that he would make inquiries.

He did so. There were several later conversations between Mr. Ragland and Mr. Lysfjord. Mr. Ragland recommended Lysfjord to the company as he knew him to be a competent workman and a competent salesman and thought he would be of some value to the company if they could find a spot where his abilities could be put to use.

He was finally able to interest Mr. Baymiller, Mr. Browning Baymiller, who is the assistant southwest district sales manager in the Flintkote office, Mr. Ragland's immediate superior.

So a luncheon conference was arranged in the fall of [755] 1951 at the Manhattan Supper Club. Mr. Lysfjord, Mr. Ragland and Mr. Baymiller attended.

The discussion at that meeting was quite general

and in the nature of an exploratory operation, simply to size up the situation and to give Mr. Baymiller a chance to see Mr. Lysfjord and to talk to him and to learn something about what sort of a person he was.

Mr. Baymiller stated unequivocally at that conference that there was no opportunity for plaintiffs to operate in the Los Angeles area, but that some outlying territories might be available. It is probable that there was some further calls by Mr. Lysfjord and perhaps also by Mr. Waldron at the Flintkote office following this first luncheon conference, but the next meeting of any significance was another luncheon meeting some two weeks or thereabouts later, again at this same restaurant, the Manhattan Supper Club.

This time it was attended by Mr. Thompson. Mr. Thompson is the southwest district sales manager, building materials division, and Mr. Baymiller's immediate superior. This luncheon was attended by Mr. Thompson, Mr. Baymiller, Mr. Ragland, Mr. Lysfjord and Mr. Waldron.

The plaintiffs presented evidence or information bearing on their ability as salesmen and as applicators and their experience was reviewed. Again at that meeting it was definitely stated nothing was available in the Los Angeles area, but [756] that the San Bernardino and the Riverside area were not being adequately covered in Flintkote's estimation and that as they had no arrangement with their present distributors that in any way gave them exclusive rights in that territory, Flintkote was free

to put anyone into that territory that they felt was not adequately then being represented, and that the San Bernardino-Riverside area was one of those spots where additional close local representation might be profitable both to Flintkote and to the contractors.

Quite a bit of discussion ensued as to what sort of an operation could be established in that field.

At that meeting one of the plaintiffs mentioned the possibility that there might be contractors in the Los Angeles area that they only would be able to interest in getting a job and could be reasonably assured of such work over any other bidder on the line because these particular contractors might know these plaintiffs and wished to give them the jobs if it was possible to do so and there weren't an actual series of formal bids where the low bidder would necessarily have to get the job, but where it was a negotiated job, that these people might well have sufficient influence with these particular contractors to get the work. And it was asked whether in that situation it would not be permissible for the plaintiffs to take those Los Angeles jobs.

Mr. Thompson said, in answer to that, "Well, if such a [757] situation comes up and there is a picture of that sort, we will consider it, but it must be especially considered on an individual basis because we repeat that there is no possibility of you people operating generally in the Los Angeles area."

It was arranged at that meeting also for financial data to be prepared and to be presented to the company, and it was agreed that these matters

would be taken up with Mr. Harkins who had the final decision.

Mr. Frank Harkins was at the time the manager of the building materials division for the Flintkote Company in the eleven western states and he was the man who would have the final decision as to the choosing of outlets of this sort for the sale of acoustical tile.

So a meeting was arranged between the plaintiffs and Mr. Harkins at the Flintkote office. At that meeting Mr. Thompson was present, Mr. Ragland was present, Mr. Baymiller was not present. He was out of town at the time that meeting took place.

Mr. Harkins reviewed the position generally with these plaintiffs and stated at that time that they were quite gratified to have somebody who was prepared to go into the Riverside-San Bernardino area and to promote aggressively the interests of The Flintkote Company in that territory, but he asked the plaintiffs if they thought there was sufficient business in [758] that area to support them.

They assured him that the territory had been examined tentatively by them and that they were confident they could make a go of it in the area.

Mr. Harkins then, in effect, accepted the two plaintiffs as Flintkote distributors, suggested that they talk to the credit manager, which was done. A Mr. McAdow interviewed them, and the meeting thus terminated with the understanding that the plaintiffs would be Flintkote products outlets in that particular territory.

Then sometime shortly thereafter plaintiffs

brought to Mr. Ragland an order for their first shipment of tile. Mr. Ragland had previously discussed the matter with them, had given them his views as to what material would be appropriate for their initial order, and when the order was brought to him at the Flintkote office he examined it and received it. They went to lunch together on that occasion.

Now the first shipment was delivered to San Bernardino on January 17 or January 18. Mr. Ragland and another Flintkote employee, Mr. Heller, apparently had to be in San Bernardino on other business but they chose that date to be there as well because they were advised that the first shipment was arriving and they thought it was appropriate to be on hand and see to it that it arrived in good order and condition and that the plaintiffs were set up to receive it. [759]

So they went out there and, as the shipment had arrived and the trucks came to the place of business, Mr. Heller and Mr. Ragland discussed the matter with Mr. Waldron and everything seemed to be in order, and they also had lunch together on that occasion.

Now sometime in the early part of February the Flintkote people received a complaint from a Mr. Krause of the Coast Insulating Products, and also about the same time from a Mr. Howard of the R. E. Howard Company. In general the basis was that here were some people that were in the Los Angeles territory that Flintkote hadn't notified either Howard or Krause about adding another account

in the area, and they didn't think that was a very handsome way to treat them when they had been dealing all this time on the basis that there were three accounts in the area here, and how come adding another one here? What is the idea back of this? What are you doing this for without notifying us? Do you think that is a fair way to treat us? Mr. Krause apparently became rather vehement on the subject.

Now this was the first notice to the Flintkote Company that the plaintiffs were operating in the Los Angeles area. Mr. Ragland was away at the time. He at that time was up on a trip from San Francisco to Portland and Seattle on some company business, and Mr. Krause talked by telephone to Mr. Lewis of the Flintkote Company. [760]

Mr. Lewis is an assistant in the sales department in this division. Mr. Krause did not come to the Flintkote office.

Mr. Lewis replied to Mr. Krause that he would report the matter to his superiors, that Messrs. Lysfjord and Waldron were supposed to be in the San Bernardino-Riverside area, and that it was a surprise to them that they were operating in Los Angeles and, if it were true, the matter would at least be investigated. But Flintkote would determine for itself what its policy would be.

Later Mr. Baymiller and Mr. Heller called on Mr. Krause and then on Mr. Hoppe and on Mr. Howard, telling each of these people that this situation would be looked into by Flintkote, and that they would make their own decision about it. There were no

threats. There was no suggestion of a boycott. There was no general meeting. There was no agreement by any of the contractors or by Flintkote as to what action would be taken.

Upon Mr. Ragland's return from Seattle, Mr. Harkins asked Mr. Ragland to investigate these and various other rumors that had come to Flintkote's attention about the activities of the aabeta company. [761]

Mr. Ragland proceeded to make the investigation. He was shown a card which somebody had referred to The Flintkote Company, indicating a Los Angeles telephone number, and no address appearing on it. But the telephone number appeared, and on calling that number Mr. Ragland made contact with the company.

There is some doubt as to whether this happened after he first made a trip to the area and couldn't find the location and came back and got this number. But, in any event, he ultimately made the telephone contact.

He came down there and found the plaintiffs at the Atlantic Boulevard address. He told them that they were, of course, not supposed to be operating in the Los Angeles area.

He also indicated that he had no authority to deal with the situation, but he had merely been sent down there to make an investigation. That whatever the company did about it would have to be decided by his superiors. At the same time there was a rumor that the company was operating another Los Angeles address. That turned out to be another

aabeta co. and had no connection with the plaintiffs' operations.

Mr. Ragland then wrote a report on the situation to Mr. Harkins, dated February 15, 1952, reviewing the results of his inquiries.

Very soon thereafter there was a general conference in the Flintkote offices, which Mr. Harkins, Thompson, Mr. [762] Baymiller and Mr. Ragland were present at, and they reviewed the facts that were disclosed by this investigation.

Mr. Harkins decided that these plaintiffs could not be trusted to keep their word, and that he felt they should be terminated as a Flintkote account. He suggested that Mr. Thompson himself, along with Mr. Baymiller and Mr. Ragland, go down there and transmit this decision.

So a meeting was arranged at the aabeta co. office Mr. Ragland, Mr. Baymiller, Mr. Thompson were present and the two plaintiffs were also present. Mr. Thompson did most of the talking.

It was a very brief meeting. Mr. Thompson explained to them that it had been decided that they could no longer supply them with tile, because he felt that, in violation of their agreement, they were doing business in the Los Angeles area.

At that meeting the plaintiffs did not deny the proposition that the plaintiffs were not supposed to be in the area. There was no mention of pressure by other contractors at that meeting.

The Flintkote people decided that, as a matter of fairness to the plaintiffs, they would at least take care of their outstanding accounts for application of

tile and gave them a reasonable period in which to interview contractors with bids that were oustanding. If they were outstanding, if they [763] could present evidence, that they had definite commitments to contractors, even in the Los Angeles area, that such tile would be supplied to them.

This arrangement was made and the tile that was required was supplied. One order was not filled, and that order was a mere resale of materials.

It had nothing to do with an application contract and the company felt that they were not obligated to supply tile in that situation. It was just a purchase for immediate resale to another person.

Now, there was never any agreement by The Flintkote Company, the testimony will show, as to the number of distributors. That Flintkote did not participate in any combination with anybody or any conspiracy in connection with this termination. That they made no agreement to terminate these people, expressed or implied, with the other distributors. As to whether at that time or earlier there was any combination by these contractors, to allocate bids between themselves or to come to an agreement on prices, that they would charge, Flintkote has no knowledge.

The dealers with whom Flintkote does business will testify that they never participated in any such scheme. And certainly, the Flintkote people will deny any participation in such, or any other conspiracy, if it ever existed.

Finally, we expect to call a certified public ac-

countant to [764] testify as regards certain matters developed from the plaintiffs' books and records.

That, ladies and gentlemen, is the general outline of the case we expect to present in the defense of this suit. I appreciate your attention, and again I admonish you what I have said is nothing but my statement and is not to be accepted by you as evidence in the case.

We are ready to call our first witness. I will call Mr. Robert Ragland.

ROBERT EUGENE RAGLAND

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated. Your full name, sir?

The Witness: Robert Eugene Ragland.

Direct Examination

By Mr. Black:

Q. Mr. Ragland, I would like to admonish you, if you please, to talk loudly and distinctly so every one of the jurors can hear everything you say, and if you do not understand my questions, do not hesitate to ask me what I said.

Be sure you understand my questions and those Mr. Ackerson will later put to you, before you answer them.

What is your present occupation?

A. I am with the Coast Insulating Products

(Testimony of Robert Eugene Ragland.)

Company [765] in the capacity of a sales promotion man.

Q. Were you formerly employed by The Flintkote Company, the defendant in this action?

A. Yes, I was.

Q. When did you leave the employ of The Flintkote Company? A. April 1, 1955.

Q. Do you recall when you started your employment with The Flintkote Company?

A. That was February 1, 1951.

Q. And in what capacity did you start your work with that company?

A. I was taken on as a—the general title was sales engineer—field service engineer, excuse me. But the purpose of that job, in my particular case, was to promote the general line of insulation board products.

Q. In that connection, did you deal with acoustical tile? A. No, sir, I didn't.

Q. Did you retain that same position during the entire time you were employed by The Flintkote Company?

A. No, I didn't. I was given the job of sales promotion for acoustical tile about June 1st of that same year, 1951.

Q. Did you retain that sales promotion job in the [766] acoustical tile department until you left Flintkote's employ? A. Yes, sir, I did.

Q. Was there any change in your duties during that entire period? A. I can't recall any.

Q. So that it is a correct statement, is it not, that

(Testimony of Robert Eugene Ragland.)

in the period, say, between the summer of '51 and March of '52, you were substantially in that same capacity? A. Yes, sir.

Q. What experience had you had prior to your employment with Flintkote in the acoustical tile business?

A. I had had approximately four and a half years' experience in the acoustical tile field as a representative of acoustical tile applicator.

Q. What company was that?

A. Harold Shugart Company.

Q. What line of tile did they handle?

A. They handled The Celotex Corporation tile.

Q. Did your work take you into the Los Angeles area during that experience?

A. At times it did, Mr. Black. I had several positions with the Shugart Company. My first experience with them, after my discharge from the Army in 1945, I went to work as a member of their application crew.

I was on work crews, putting up the material, and it [767] was more the mechanical end of it. Later I was taken into the sales department as a junior salesman, to actually pursue the acoustical jobs from the customer point of view.

Q. In that connection did you meet the plaintiffs while you were in that——

A. Yes, I did, both the plaintiffs were foremen for the Shugart Company, on the Shugart Company crew. I worked for each one of them on various jobs many times.

(Testimony of Robert Eugene Ragland.)

Q. How frequent were your contacts with Mr. Lysfjord and Mr. Waldron?

A. Well, as far as working on their respective jobs, I would say that Shugart possibly had 20 foremen. I would be assigned to one of their jobs maybe every six weeks.

Q. Did that contact develop into a relationship which took you beyond your business contact? Did you have any personal or friendly relations——

A. Yes, sir, it did. We seemed to all have an interest in fishing and we—I can recall several fishing trips we took together, and Christmas parties we were at together. And some card games after work at Mr. Waldron's house, I believe.

Q. Did you keep up that personal relationship during the time you were employed with The Flintkote Company, with the plaintiffs?

A. Yes, sir. [768]

Q. What was the circumstance when the first discussion took place between you and either of the plaintiffs, with respect to the acquisition of a line of tile from The Flintkote Company, if you recall?

A. I am pretty sure that must have taken place shortly after I entered the employment of The Flintkote Company.

It was more of a dream, I think at first, when it was proposed by Mr. Lysfjord. He had left—he and Mr. Waldron both had left the Shugart Company and had taken jobs as salesmen for, I believe it was, the Coast Insulating Products Company.

(Testimony of Robert Eugene Ragland.)

They approached me by telephone and I recall several luncheons we had, with the intention or the over-all idea of securing some of the Flintkote tile, so they might establish their own business.

Q. What did you say, in general, to this inquiry, if you remember?

A. Well, at that time, due to these first contacts that I speak of, Mr. Black, I was not in a position to tell them one way or the other, because I had nothing to do with the acoustical tile.

Q. Later when you got into the acoustical tile department, did you talk to them again on the subject? A. Yes, sir, I did.

Q. What was said by you, if you remember? I don't [769] expect you to recall every detail of every conversation. But just what, in general, was the nature of the discussion?

A. After I was assigned to this acoustical tile duty by the company, it was my purpose to move through the Pioneer Division, which comprises the 11 Western States, for The Flintkote Company, and establish persons that might be interested in selling our acoustical tile. Persons that knew something about the acoustical tile business and had some money to establish their own business.

In my brief rounds at this time—you understand, I was just a junior man—it seemed to me we were very weak in some of our outlying territories, namely, Albuquerque, El Paso, Phoenix, Seattle, and Denver.

My thoughts to those questions at that time, that

(Testimony of Robert Eugene Ragland.)

you originally asked me, were to steer these two men, if possible, to some of these districts I have just mentioned.

I stated that we were adequately represented at the time in the Los Angeles district by our three current accounts. [770]

Mr. Ackerson: May we have the time and place and the basis for this, Mr. Black? I don't know whether it occurred February, '51, or when.

Q. (By Mr. Black): Are you able to place with some accuracy the time of this discussion?

Mr. Ackerson: And who was present, and so forth.

Q. (By Mr. Black): And which of the plaintiffs were present or whether both of them were?

A. Very seldom did I ever see both of the plaintiffs together at this time anyway. Mostly it was a discussion with Mr. Lysfjord.

Q. And at what time do you refer to now when you are talking about the Los Angeles territory being adequately represented?

A. Shortly after I had occasion to promote this acoustical tile. Let's say the month of June, 1951.

Also at this time I had taken, or I was taking a business course in salesmanship down at the University of Southern California night school, in which I interested both the plaintiffs, and they subsequently came down there with me. And there was an occasion when we were both together, or all three of us were together, and that discussion very likely could have taken place at any one of those meetings. [771]

(Testimony of Robert Eugene Ragland.)

Q. What, if anything, was said to you with respect to the possibility of operating in these outlying territories?

A. It seems to me that there was a slight interest shown in the Phoenix district.

Mr. Ackerson: May we have the people present, the place and the time, if possible?

Q. (By Mr. Black): Can you remember?

A. I don't remember.

Q. Who said what?

A. I was the one that tried to get them over to Phoenix, and I recall them telling me——

Mr. Ackerson: I would like to have the conversation without a formal objection. What did you say and who did you say it to?

Q. (By Mr. Black): Yes, if you are able to say whether either or both of the plaintiffs or only one, which one, please do so.

A. Mr. Lysfjord expressed interest in a possible Phoenix operation.

Mr. Ackerson: What did he say? Will you take care of that, Mr. Black?

Mr. Black: I will try to.

Q. You see, the point is, Mr. Ragland, a witness is permitted to testify as to the substance of what somebody [772] said to him, but whether he shows interest or displays indifference is your conclusion, you see. So as nearly as possible—we don't expect you at this late date to reconstruct the words verbatim—but as nearly as possible confine your testimony when we are dealing with conversations to the

(Testimony of Robert Eugene Ragland.)

substance of what was said and who said it. So try, if you can, to reconstruct that discussion in terms of the substance of what was said.

A. Well, in summation I proposed to Mr. Lysfjord the Phoenix area, and he said that he would take a trip to Phoenix, which he reported to me that he did, over a week end.

The result of that trip, he told me, was that he didn't get too much out of the trip because it happened to be on a Sunday and things were pretty well closed in that city, and he wasn't too enthusiastic about Phoenix.

Q. Did you initiate any discussions with your own superiors in the Flintkote Company with respect to the possibility of establishing the plaintiffs in some way with the Flintkote Company?

A. No, sir, I didn't at that time.

Q. Did you at a later date?

A. Yes, sir; I did.

Q. What were the circumstances under which that was done?

A. I told Mr. Baymiller that they were two [773] of my friends that had some experience in the acoustical business, and that they had a little money and wanted to establish a dealership for us some place.

Q. And were you able to arrange any kind of a meeting with Mr. Baymiller and the plaintiffs or either of them?

A. After a time, I was, Mr. Black. The Flintkote Company, in my experience, had never moved too fast on any recommendations that I made——

(Testimony of Robert Eugene Ragland.)

Mr. Ackerson: I am not going to move to strike the conclusions or anything, but I would like to have Mr. Black ask his client to state facts.

Mr. Black: I think that that is probably the fact, that they didn't move too fast, but——

The Court: Let us get at the conversations. Tell us what was said. Do not give us a general conclusion as the result of what was said.

Q. (By Mr. Black): What, if anything, was done in the way of a meeting?

A. Well, eventually I was able to get Mr. Baymiller to a luncheon with Mr. Lysfjord.

Q. About when did that take place?

A. As near as I can recall, that was in the month of September.

Q. 1951? [774] A. Of 1951.

Q. And where was the meeting held?

A. At the Manhattan Supper Club on South Western in Los Angeles.

Q. Who else was present?

A. Mr. Lysfjord, Mr. Baymiller and myself.

Q. What position did Mr. Baymiller hold at that time?

A. Mr. Baymiller was an assistant sales manager to Mr. Thompson for the Flintkote Company in their southwest district.

Q. As near as you now remember, will you please state what was said at that meeting and by whom?

A. Mr. Lysfjord presented himself to Mr. Baymiller as a possible applicator. He stated that he felt

(Testimony of Robert Eugene Ragland.)

that he had experience enough to adequately handle a dealership in this acoustical tile business.

Mr. Baymiller again having been from the Phoenix district for many years, tried to interest Mr. Lysfjord in going to that section of the country.

Mr. Ackerson: May we have the conversation?

Q. (By Mr. Black): Try to keep it on the level of what he said or the substance of what was said instead of "tried to interest." State what he said, if you can. What did Mr. Baymiller say in that connection? [775]

A. Mr. Baymiller said that under no circumstances could Lysfjord operate in the Los Angeles territory. We had at that time three other contractors that were established in Los Angeles, had financial backing, namely the Reeder Company, Acoustics, Inc., and the C. F. Bolster Company. That matter of Los Angeles was dropped after that statement.

Q. At that time were those three companies handling Flintkote products?

A. No, sir, none of those companies had Flintkote at that time. [776]

Q. I don't know that I understood the statement then. What was——

A. Mr. Baymiller had told Lysfjord to forget all about Los Angeles, because we had adequate representation with our three current accounts, and if we could induce our management to take on a fourth account he would be No. 5 in line.

(Testimony of Robert Eugene Ragland.)

Q. Was anything said, anything else said at that meeting you can now recall?

A. No, sir. I don't think I can recall any more.

Q. Was there any arrangements made after that meeting to have a further discussion, or was that just left indefinite, or what?

A. Mr. Lysfjord was anxious for another meeting, so he stated. Mr. Baymiller said he would see what he could do to interest his immediate superior in such a meeting.

Q. After this luncheon broke up, did you have any further contacts on this subject with either of the plaintiffs?

A. I discussed the meeting we had just had with Mr. Baymiller. It was agreed upon that we would try to interest Mr. Thompson in a future meeting.

Q. Did you have any discussions with either of the plaintiffs immediately following this last luncheon meeting you have just described?

A. Not immediately afterwards. Mr. Lysfjord, however, called me quite a few times on the telephone, asking to know [777] the results of the possible chance of this future meeting.

Q. Was there any further conference arranged between yourself and the plaintiffs on this subject?

A. Shortly after that initial meeting I spoke of, three weeks, Mr. Lysfjord dropped in our office quite casually, hoping to hurry things along, I am sure.

The Court: Well, we can't have a running interpretation on people's hopes and fears. You tell us what they said.

(Testimony of Robert Eugene Ragland.)

The Witness: He said, in substance, to that effect, he hoped to hurry the third meeting along.

Mr. Thompson wasn't available at that time, nor was Mr. Baymiller. Lysfjord and I went to lunch.

Q. (By Mr. Black): Did you have later a meeting at which Mr. Baymiller or Mr. Thompson or both or either were present?

A. Yes, sir, we did. We had a second Manhattan Supper Club meeting at which Mr. Thompson and Mr. Baymiller and both the Plaintiffs and myself were present.

Q. What is, or what was Mr. Thompson's position?

A. Mr. Thompson is sales manager for the Southwest District for the Pioneer Division of The Flintkote Company.

Q. What was said by the parties that you remember at that luncheon?

A. Introductions were made. Mr. Waldron particularly was introduced, having entered into the picture for the first time. [778]

Mr. Lysfjord, I believe—I know he had a portfolio of jobs he had secured from various contractors, assigned to the Downer Company, through where he was employed—where he was employed.

He presented those papers to Mr. Thompson.

Mr. Thompson thought that was fine, he must be a wonderful salesman, he said, to secure those contracts.

However, he would not be allowed to pursue business in Los Angeles were he to be granted a franchise.

(Testimony of Robert Eugene Ragland.)

We spoke of San Bernardino, Riverside and Imperial Counties as a possibility. I brought that up because I had worked out there many years for The Flintkote Company. I was trying, you understand, to open the door for these two men.

Mr. Ackerson: May we have what you stated, Mr. Ragland.

The Witness: That was it.

Mr. Ackerson: You stated——

The Witness: Yes, sir.

Mr. Ackerson: Go ahead.

Q. (By Mr. Black): Go ahead.

A. That meeting broke up in about an hour's time, after lunch, and Mr. Baymiller, Mr. Thompson and myself decided to do everything we could to——

Q. Just a moment, please. Before we leave this meeting, was anything said at that meeting by Mr. Waldron about anticipated objection by the contractors if the plaintiffs were [779] allowed to operate? A. I don't recall that.

Q. Specifically, did Mr. Waldron say that the dealers were organized and were not competing with each other any more?

A. I don't recall that, either.

Q. Did Mr. Thompson state that no amount of pressure would intimidate The Flintkote Company?

A. No, sir.

Q. Did Mr. Thompson say anything about the company would be pleased to allow the plaintiffs to

(Testimony of Robert Eugene Ragland.)

work in Los Angeles if they also worked in Riverside and San Bernardino?

Mr. Ackerson: Your Honor, I am going to object to this last question; it is very leading. I think the witness should be required to state what——

The Court: It is leading, Mr. Black.

Mr. Black: Well, I think we are entitled to categorically have him answer specific matters.

I agree I should have him state generally first on the subject matter. I will try to cover the field generally, first.

Q. (By Mr. Black): Do you recall whether anything was said by Mr. Thompson with respect to an operation that covered both Los Angeles and Riverside and San Bernardino?

Mr. Ackerson: Same objection, your Honor [780]

The Court: Overruled.

Mr. Ackerson: That is as leading as the other question.

Mr. Black: Oh, no, it isn't.

The Court: It has been overruled, Mr. Black. It is directing the witness' attention to the subject matter he wants to discuss. The other one was, in effect, suggesting the answer; this question was not.

Mr. Black: Would you repeat the question?

(Question read.)

The Witness: Shall I answer that? [781]

Q. Yes.

A. Very definitely. Mr. Thompson never stated "and Los Angeles" to any proposal that we made.

(Testimony of Robert Eugene Ragland.)

Q. Do you recall——

Mr. Ackerson: I don't think that that is responsive. May we have what he did state? I ask that that be stricken as not responsive.

Mr. Black: If the court please, only the proponent of the question can make that objection.

The Court: Not any more, Mr. Black, but I think the answer may stand. The motion is denied.

Either party may object that an answer is not responsive. The way these witnesses have been testifying and the way the questions have been propounded, I will let the answer stand to this question.

Q. (By Mr. Black): Was there anything said at that meeting with respect to specific jobs in the Los Angeles territory?

A. At this second Manhattan Supper Club meeting?

Q. Yes.

A. The particular jobs that Mr. Lysfjord had were all Los Angeles jobs, and Mr. Thompson stated that under no circumstances would they be continued to pursue to such projects as those.

Q. Was there anything said in connection with that [782] subject as to any possible special exceptions?

A. Yes, sir, there was. If the defendants, either one of them, had any——

Mr. Ackerson: Your Honor please, I am going to object to the last question as leading. This witness can state what was said, but I mean after all, if you

(Testimony of Robert Eugene Ragland.)

tell him the subject matter, and so forth, I think it is leading. I object to it on that ground.

The Court: It has been answered.

Mr. Ackerson: The question itself was leading, your Honor. Was anything said about a specific subject matter that is defined in the question I would object to as being a leading question, your Honor.

The Court: I don't think the particular question is leading. Overruled.

Mr. Black: The objection was overruled?

The Court: Yes.

Mr. Black: Will you repeat the last question, please?

> (The question referred to was read by the reporter, as follows: "Q. Was there anything said in connection with that subject as to any possible special exceptions?")

The Witness: Mr. Lysfjord said that he had developed several close contacts in the Los Angeles district with various contractors and wouldn't he be allowed to continue with [783] pursuing business in their offices.

Mr. Thompson said no. If and when that occasion arises and you are the only ones that they will give the job to, let us know and we will take a look at it.

Q. (By Mr. Black): Now do you recall anything else that happened at that meeting at this time?

A. I believe that is all I recall, Mr. Black.

Q. What developed in connection with this rela-

(Testimony of Robert Eugene Ragland.)

tionship with the plaintiffs immediately following this second luncheon conference?

A. Mr. Baymiller, Mr. Thompson and myself decided that The Flintkote Company could be bettered by having these two men establish an office for us in San Bernardino, and at our earliest possibility we would present the case to Mr. Harkins for his decision with our recommendations.

Q. Now who was Mr. Harkins?

A. Mr. Harkins was the general sales manager of the Pioneer Division of The Flintkote Company.

Q. Any particular department?

A. Building Materials Department.

Q. Did you arrange such a meeting with Mr. Harkins? A. Yes, sir, we did.

Q. And what took place, if you were present?

A. Mr. Lysfjord and Mr. Waldron came into our office [784] and Mr. Thompson and I took them into Mr. Harkins' office.

Mr. Harkins stated that he was glad to meet them, and that we were glad to have two men of their capabilities handling our acoustical products.

He went on to state the qualities of the particular material. He stated that had they made a survey of the three counties involved, did they think that they could make an adequate living out of that territory.

They said that they were sure that they could.

That was the substance, as I recall, out of that meeting.

(Testimony of Robert Eugene Ragland.)

Q. What, if anything, was done immediately thereafter, if you remember?

A. After that meeting, which was very short in duration, I took Mr. Lysfjord and Mr. Waldron at Mr. Harkins' request over to our credit department, Mr. McAdow, introducted them, and they presented their financial statement to him at that time.

I recall that Mr. McAdow was on the phone on the time we went in and possibly being in the office five minutes, he was on the phone three minutes of that time.

He took the statement, shook their hands, and said, "I will go over this at my first convenience. It is nice to meet you."

Q. Did you have any connection with the plaintiffs' [785] first order of tile from your company?

A. Yes, sir, I did.

Q. State what you did and when you did it and what you recall about it.

A. Mr. Lysfjord and Mr. Waldron came into our office with a purchase order filled out, and naturally they were quite proud of their first order of buying approximately $6,000 worth of material——

Mr. Ackerson: I am not going to ask that these conclusions be stricken, but maybe you can caution your witness a little bit, Mr. Black.

Mr. Black: Yes.

The Witness: We accepted the order.

Q. (By Mr. Black): Did you have any previous

(Testimony of Robert Eugene Ragland.)

discussions with the plaintiffs prior to the receipt of this order?

A. Yes, sir, I advised them——

Q. How?

A. As to quantities, make-up of a car, what comprised a carload of material, and what products were found that were selling the best, what they should stock. I think that was the general conversation.

Q. Do you recall what time of the day it was that the order was presented to you at the Flintkote office?

A. It was shortly before noon, around 11:00 o'clock in [786] the morning.

Q. What, if anything, did you do after the order was received so far as meeting the plaintiffs is concerned? A. I took them both to lunch.

Q. Where?

A. At McDonald's Plantation on Firestone and Long Beach Boulevard. It is where we take all of our customers.

Q. Did you have any discussions with the plaintiffs with respect to a cut of the Flintkote emblem for use on stationery or cards or what-not?

A. Yes, sir, I did. I had taken both plaintiffs over to our advertising department, which was down the street a block from our sales department, and introduced them to a Mr. Imlah, who was our publicity man, and he showed them what was available to them in the way of emblems or cuts for their printing matter, and I also showed them the litera-

(Testimony of Robert Eugene Ragland.)

ture that was available to them for their particular products and the samples, how we made up our samples, and what they could expect from us in the way of samples.

Q. Do you recall the arrival of the first shipment of title that the plaintiffs ordered from the company? A. Yes, sir.

Q. What were the circumstances under which that occurred?

A. Mr. Heller, who had—— [787]

Q. Who is Mr. Heller? What is Mr. Heller's position?

A. Mr. Heller was the head of our insulating board promotional department.

Q. Proceed.

A. Mr. Heller wanted to take a look at the new Safeway job in which our ceiling tile was being applied in San Bernardino, and we also found out from our traffic department that the first shipment of tile was to be delivered to the aabeta company, and we went out together to inspect the Safeway job and also to inspect the shipment of acoustical tile to the aabeta company to see that it arrived in good shape and they were happy with its destination —I don't mean destination—I mean disposition.

We looked around the premises that the aabeta company had set up and I recognized one man they had working for them out there putting in their office, fixing their office up. And then Mr. Waldron, Mr. Heller and myself went to lunch.

The Court: Short recess.

(Testimony of Robert Eugene Ragland.)

(Short recess.) [788]

Q. (By Mr. Black): Just before the recess, Mr. Ragland, we were discussing the first shipment of tile, and its arrival at San Bernardino.

Do you remember what address you went to when it was delivered?

A. I don't recall the number of the street, but it was 9th and Waterman in San Bernardino.

Q. What, if any, equipment was there in connection with the delivery of that tile, automotive equipment?

A. Well, the Waterland truck was there. It had semi-truck and trailer, big rig. I don't recall any other machinery being there.

Q. Did you observe any part of the shipment actually being taken off of the trucks and put into——

A. Yes, sir, the first truck was being unloaded, the first part of the truck was being unloaded when Mr. Heller and I arrived, and it was being stacked in the warehouse.

Q. Do you recall a job for the Owens Roof Company that your company had something to do with?

A. Yes, I do.

Q. About what time, do you recall the circumstances under which that job arose?

A. Yes, sir, I do. Firstly, the Owens Roof Company is a roofing applicator handling Flintkote roofing materials, and they are serviced by Mr.

(Testimony of Robert Eugene Ragland.)

Anderson, a salesman for The [789] Flintkote Company on roofing products.

Mr. Lysfjord and I were in our—in the Flintkote offices and this Mr. Anderson came in one afternoon and stated that the Owens Roof Company wanted to soundproof or sound-condition their front offices, which faced on San Mateo Street, because the streetcar traffic and the general truck traffic was getting a little too annoying, and would we sell them the tile to do the job.

That was a very common request from various Flintkote representatives in the field. They felt, or still do feel, that if they handle one of the Flintkote products they are entitled to buy all of them.

It is our policy to sell such a request through one of our contractors——

Mr. Ackerson: Your Honor please, I object to this, without some foundation.

The Court: Sustained. It wasn't responsive.

You can't tell what your company policy was. You have to tell what was said in respect to these conversations.

Mr. Black: Well, would you give me what was said just before the stricken portion.

(Whereupon, the record was read as follows: "That was a very common request from various Flintkote representatives in the field. They felt, or still do feel, that if they handle one of [790] the Flintkote products they are entitled to buy all of them.")

Q. (By Mr. Black): Mr. Anderson stated, did

(Testimony of Robert Eugene Ragland.)

he, that the Owens Roof people wanted to buy acoustical tile? Was that the occasion for that comment? A. That is right.

Mr. Ackerson: May we have the time and place and parties present? [791]

Mr. Black: I think we have the parties.

Q. It was Mr. Anderson, Mr. Lysfjord and yourself, is that right?

A. Mr. Baymiller was there, too.

Q. About what was the date of that?

A. Between Christmas and New Year's, I believe, to the best of my knowledge.

Q. And what was said in Mr. Lysfjord's presence on that occasion?

A. Mr. Baymiller suggested we call the R. E. Howard Company and have them get in contact with the Owens Roof Company and either sell them the material or sell them the completed installation, material and labor.

Mr. Lysfjord said that he would like to take a chance at that job because he wasn't particularly busy at that time and he felt that——

Mr. Ackerson: I object to it as calling for a conclusion.

The Court: You cannot tell what you felt. You can tell what you said.

Q. (By Mr. Black): Tell what you said?

A. I said to myself——

The Court: No, no. [792]

Q. (By Mr. Black): What did you say to Mr. Lysfjord, if anything?

(Testimony of Robert Eugene Ragland.)

A. To his request I said, "Well, you might go down there and see if you can put that job in for them, and there is an opportunity for you to make some money until you get set up in your own business."

And I believe, I recall Mr. Anderson, Mr. Lysfjord and myself, going down to that Owens Roof Company job.

Mr. Anderson introduced us, Mr. Lysfjord took a look at the job, said he would like to put the job in, and that is all I remember about that.

Q. Did you talk to anybody in the Owens Roof Company yourself on that occasion?

A. I talked to Mr. McLain, Sr., who was the president of the Owens Roof Company at that time.

Q. Do you recall having any discussions with the plaintiffs or either of them about the Lido Club?

A. No, sir, I don't recall anything like that.

Q. Do you know anything about the Lido Club?

A. I know it is an apartment in Hollywood.

Q. Did you have anything to do with installing tile in that place personally?

A. No, sir, I didn't.

Q. Did you know of your company doing so?

A. No. [793]

Q. The answer was no? A. No.

Q. Do you know where you were in the early part of February, 1952?

A. I believe I made a sales trip to Phoenix and Tucson, El Paso and Albuquerque, and I visited

(Testimony of Robert Eugene Ragland.)

San Diego for a week and I was in San Francisco for a week.

Q. And where were you after San Francisco?

A. Portland and Seattle.

Q. And did you return immediately to Los Angeles from Seattle? A. Yes, sir, I did.

Q. Do you recall anything in connection with the aabeta company to your knowledge when you returned to Los Angeles from Seattle?

A. I returned on a Friday night and when I went into the office Monday morning I was told by Mr. Lewis, Mr. Baymiller, that the aabeta company was rumored to be operating in the Los Angeles district and that they had taken several acoustical jobs in the Metropolitan area.

That was the first thing I heard when I went into the office that Monday morning. [794]

Q. What, if anything, did your company do in your presence on that subject?

A. Presently that same morning Mr. Harkins and Mr. Lewis, Mr. Thompson, Mr. Baymiller, and myself had a meeting, and Mr. Harkins directed me to find out if the various rumors we had heard were true. As soon as that meeting was over I started out to do what I was told.

Q. What did you do in that connection?

A. I had a phone number, which was the listed number for the aabeta co., supposed aabeta co. in Bell, which I called and found Mr. Lysfjord present.

I inquired of the address from him and told him,

(Testimony of Robert Eugene Ragland.)

if he could, to wait, I wanted to come over and talk to him; and I went right over.

Q. Who was present?

A. Mr. Lysfjord and Mr. Yeomans.

Q. What did you say and what was said to you on that occasion?

A. Well, I expressed my surprise at finding them set up in——

Mr. Ackerson: Well——

Q. (By Mr. Black): State what you said, as near as possible.

A. I said I was surprised to find them established in that location. That they were not supposed to be there, and [795] and that I had heard that they had taken three jobs, and asked if that were true, which they did not deny.

The Court: What did they say?

The Witness: They said it was true, they had taken the three jobs.

The Court: You see, you answered, you told us something they said they said the first time, they did not deny it. You just left us up in the air, giving us a mixture of confusion and nothing.

So please try to—just take your time and when the question calls for a conversation, tell us what the conversation was, instead of your conclusion on it.

The Witness: The three specific jobs I recall were the Van Nuys Hospital, Community Hospital, and a drugstore in Hawthorne, and Waggoner Real

(Testimony of Robert Eugene Ragland.)

Estate job downtown. These were all confirmed by the plantiffs to me.

Mr. Lysfjord wanted to know if The Flintkote Company wanted them to go back out to Riveside and San Bernardino, and stay out there, if nothing more would be said.

I stated I didn't know, it wasn't my decision to make that statement at that time. That was the general trend of that first meeting.

Q. (By Mr. Black): Was anything said by Mr. Lysfjord, if you recall, with respect to these particular accounts and the relationship of the abbeta co. to those accounts?

A. Mr. Waldron arrived shortly after I did and this [796] Waggoner Real Estate job was mentioned specifically, and Mr. Waldron said that was a closed account of his, and that he would take all of the work that the Waggoner Real Estate Company, and construction company had. And that no one else could get it, anyway; that I do recall.

Q. Is there anything else you remember about that meeting? A. No, sir.

Q. Did you do any other investigating on your own at that time, to find out about the plaintiffs' activities?

A. I contacted the Contracting Engineers, which were the contractors on the Van Nuys Hospital, I believe, and talked to a Mr. Sharf and asked them—asked him if the aabeta co. was doing all of their acoustical work.

He said no, it was the policy of the Contracting

(Testimony of Robert Eugene Ragland.)

Engineers to give the low bidder all of the contract work.

Mr. Lysfjord had contended that that was another closed account of his, and no one else could do any of their work, anyway. [797]

Mr. Ackerson: Pardon me. Was that the Wagner Company, Mr. Ragland?

The Witness: That was Contracting Engineers at Vernon and Arlington.

Mr. Ackerson: I see.

Q. (By Mr. Black): Did you—pardon me. I didn't mean to interrupt you.

A. Also I went out to Ontario and contacted an architect out there to find out if the abbeta people had been actively engaged in promoting their activities in that district, and found out from Architect Dewey Harnish that they had, that he had received a call from Mr. Waldron.

And I contacted an architect in Riverside, Herman Roanoke, and he also recalled Mr. Waldron being in there.

I talked to Gordon Fields in San Bernardino. I checked over at the Waterman address and found that the company was still there, actively physically there, that material was in the warehouse.

I talked to our various accounts in Los Angeles, finding out for myself a little more what had taken place which I was out of town. They stated that they were not too happy with me for not letting them know about a fourth account in Los Angeles.

I ran down a lead on North Juanita Avenue, a

(Testimony of Robert Eugene Ragland.)

rumor had [798] it that the abbeta company also had an auxiliary office——

Mr. Ackerson: Now, if your Honor please, this is a conclusion too. I don't know what a rumor means here and I will object to it.

The Court: Sustained. There has been an awful lot of hearsay here but no one has been objecting.

Mr. Black: If the court please, I think this is all admissible, not with any idea of proving or disproving the truth or falsity of what he may have been told, but it certainly has a direct bearing on the information on which the defendant acted, and the motives involved in the case.

We are not using it in its hearsay aspects except as to what information was available to the company to actuate that in their dealings with the parties.

The Court: The immediate objection to it was that the witness was stating a conclusion. So go ahead.

Mr. Black: That possibly may be true.

Would you kindly read what was said just before the objection?

(The record referred to was read by the reporter as follows:)

"A. * * * I talked to our various accounts in Los Angeles, finding out for myself a little more what had taken place while I was out of town. They stated that they were not too happy with me [799]

(Testimony of Robert Eugene Ragland.)

for not letting them know about a fourth account in Los Angeles.

"I ran down a lead on North Juanita Avenue, a rumor had it that the abbeta company also had an auxiliary office——"

Q. (By Mr. Black): I take it you were asked by Mr. Harkins or somebody to investigate whether they were operating in that address. Did you do so?

A. Yes, I did.

Q. What did you find there?

A. I found an organization called the Abetter Carpet Cleaning Service, next door to the C. F. Bolster Company.

Q. How long did it take you to make this investigation, if you recall?

A. I spent that whole week on that investigation.

Q. Did you make any report to your superiors with respect to what you found?

A. Yes, sir, I wrote a report to Mr. Harkins, which I was in the habit of doing, stating——

Q. Pardon me. Don't give me the substance of what the report stated. The document will speak for itself.

(Addressing Council): You have a copy of this?

Mr. Ackerson: Yes.

Mr. Black: I will ask that this document be marked for [800] identification.

The Clerk: That will be Defendants' Exhibit I for identification.

(The document referred to was marked Defendants' Exhibit I for identification.)

(Testimony of Robert Eugene Ragland.)

Q. (By Mr. Black): I show you a document, Mr. Ragland, on a letterhead of Pioneer-Flintkote inter-office correspondence, from yourself to Mr. F. S. Harkins, bearing the date February 15, 1952, and I will ask you what that document is.

A. This is my report to Mr. Harkins after that week's investigation.

Q. Was that report made out on the date that it bears?

A. If that is Friday, if that date happens to be a Friday, I am sure it is.

Q. Attached to this report, Mr. Ragland, or stapled to it, is a card marked "Elmer Lysfjord, aabeta company," and also a card "Abetter Floor Service Company."

Mr. Ackerson: Now that I subpoenaed, Mr. Black, and that addenda to that I have never received or seen.

Mr. Black: I am sorry.

Mr. Ackerson: I will ask you to lay a foundation for the cards.

Mr. Black: I am about to.

Mr. Ackerson: All right. [801]

Q. (By Mr. Black): Do you recall those cards in connection with that report, Mr. Ragland? I will ask you to examine this (indicating).

A. I don't recall where I got the Elmer Lysfjord card, but I do recall where I got the Abetter Floor Service card, and that was from this man here, Roy J. Murphy, that ran this organization (indicating).

(Testimony of Robert Eugene Ragland.)

The significance of the Abetter Floor Service was its proximity to the C. F. Bolster Company.

Q. I take it your investigation indicated there was no connection between that floor service company and the plaintiffs?

A. It was just someone had jumped to a conclusion that Abetter and aabeta were the same organization.

Mr. Black: I will offer this document in evidence as Defendant's Exhibit I.

Mr. Ackerson: No objection.

The Court: Received.

(The document heretofore marked Defendant's Exhibit I was received in evidence.)

Q. (By Mr. Black): What, if anything, took place in your company after you presented this report, Mr. Ragland?

A. Shortly after I presented that report Mr. Harkins called Mr. Lewis and Mr. Thompson and Mr. Baymiller and myself into another [802] meeting.

At that time he stated that——

Q. Who did?

A. Mr. Harkins stated that the aabeta co. had broken their gentlemen's agreement to do business in the Los Angeles area, and that he saw no other course of action than to terminate with them as soon as possible.

Q. I think you said they had broken their agree-

(Testimony of Robert Eugene Ragland.)

ment to do business in the Los Angeles area. Do you mean exactly that, Mr. Ragland?

A. Broken their agreement by doing business in the Los Angeles area.

Q. That is what I assumed you meant. What, if anything, did you do following this conference?

A. Mr. Thompson, Mr. Baymiller and myself were directed by Mr. Harkins to go over to the aabeta office in Bell, California, and terminate.

Mr. Thompson was designated as the spokesman for the group. And I called the number and made sure that they were there.

I think Mr. Lysfjord was present, and he said that he would contact Mr. Waldron and have him present.

Q. What was done after that communication?

A. Mr. Thompson, Mr. Baymiller and myself went over to the Bell office and met Mr. Lysfjord and waited possibly ten minutes, until Mr. Waldron appeared. [803]

And at that time Mr. Thompson told both of the plantiffs that since they had broken their agreement with us, that we were going to have to terminate our association with them.

He also stated that The Flintkote Company would honor any signed purchase orders they might have outstanding, no matter where they were. And no matter what the quantity might be, if it were two feet or two thousand feet or two hundred thousand feet, that we would accept those orders at a carload price. In other words, they would not have to pay

(Testimony of Robert Eugene Ragland.)

more than the carload price for anything outstanding they might have.

Mr. Lysfjord said that he was shocked, but he thanked us profusely for giving them the impetus to get into business for themselves.

That is all I can remember. We left shortly thereafter.

Q. Was there any discussion at that meeting with respect to pressure by the other contractors upon Flintkote Company?

Mr. Ackerson: I object to that as leading, your Honor.

The Court: It can be answered yes or no.

The Witness: No.

Q. (By Mr. Black): Was there any discussion at that meeting to the general effect that the decision to terminate came from higherups in the company?

Mr. Ackerson: Same objection, leading, your Honor. [804]

The Court: Sustained.

Q. (By Mr. Black): Was there anything said with respect to the authority of Mr. Thompson to come to this decision himself, or anything relating to that general subject?

Mr. Ackerson: Same objection.

The Witness: I don't recall.

Mr. Ackerson: Same objection, leading, your Honor.

The Court: Well, it is very difficult, Mr. Acker-

(Testimony of Robert Eugene Ragland.)

son, to direct his attention to a particular subject without leading.

I think the result of the several questions which have been put and the objection sustained to have had, however, the effect of directing the witness' attention to a particular area the counsel would like to have him testify in. Without having further attempts, to avoid the technicality of the question being leading in form, we will ask the witness to go ahead and answer that last question.

The Witness: I don't recall any reference to that, Mr. Black.

Q. (By Mr. Black): Did anybody speak in a loud tone of voice, beyond the ordinary conversational tones, at that meeting?

A. No, the conversation took place at a very normal tone. There were no loud outbursts, or anything like that.

Q. Do you recall whether Mr. Baymiller said anything at that meeting? [805]

A. I don't recall what Mr. Baymiller said.

Q. Prior to the termination did you ever see Mr. Krause at the Flintkote office?

A. No, sir.

Q. Did you see him anywhere else prior to the termination? A. I visited his office.

Q. When did you visit his office?

A. During that week of—when I was directed by Mr. Harkins to investigate these various rumors.

Q. Did he pound on the desk or shout at you at that time?

(Testimony of Robert Eugene Ragland.)

A. No, he was—expressed his disappointment in me.

The Court: What did he say?

The Witness: He said that he was shocked to think that we would start a fourth account in Los Angeles, without at least telling him, or advising him.

Q. (By Mr. Black): Were there any other representatives of the Flintkote contractors at that time present when you saw Mr. Krause?

A. Not at Mr. Krause's office.

Q. Did you see Mr. Howard about that time?

A. I saw him during that week, too.

Q. Was there anybody present at Mr. Howard's office, besides the Howard people?

A. No, sir. [806]

Mr. Ackerson: I don't understand that the witness testified it was in Mr. Howard's office. Let him go ahead, if he did, if that is what he means.

Q. (By Mr. Black): Were there any people from any company, other than the Howard Company, at the time when you saw Mr. Howard?

A. No, sir, there were not. [807]

Q. Was anything said about boycotting the company? A. I don't recall anything like that.

Q. Did you see Mr. Hoppe at that time?

A. Yes, sir.

Q. Where did you see him?

A. In his office.

Q. Did he state, make any statements, about what he proposed to do in connection with the plaintiffs' operations? A. No, sir, he didn't.

(Testimony of Robert Eugene Ragland.)

Q. Did you ever attend any general meeting of the Flintkote contracts on this subject?

A. No, sir.

Q. Was it ever brought to your attention that there was ever such a meeting? A. No, sir.

Q. Did you ever tell the plaintiffs that there was such a meeting? A. No, sir.

Mr. Ackerson: I will object to it as being indefinite, your Honor. I don't know what counsel means by "such a meeting," without the where and when.

The Court: It is overruled, but it is not worth much unless you tell us where it was.

Mr. Black: We are in this position, if the Court please: It has been testified to, over our objection, that Mr. Ragland [808] testified or stated that there was a meeting of the contractors. We deny there was any such meeting. How can we give him the time, place, and circumstances of the meeting when we deny that it existed?

Mr. Ackerson: From the testimony of the plaintiffs that you deny, Mr. Black.

The Court: Do the plaintiffs give a time and place?

Mr. Ackerson: The plaintiffs gave a time and a place, as I recall it, about 30 days before the termination at the Flintkote offices. If he wants to ask about that, I will withdraw the objection.

Mr. Black: I asked him if he ever made such a statement.

Mr. Ackerson: Regarding Krause.

(Testimony of Robert Eugene Ragland.)

The Court: The plaintiffs have limited apparently their theory that there was such a statement made at one time and about the time and place that Mr. Ackerson has stated, so let us get the time and place.

Q. (By Mr. Black): Do you recall making a statement to the plaintiffs, or either of them, about a meeting between various Flintkote contractors and Mr. Lewis of the Flintkote office?

A. A joint meeting of all three contractors?

Q. Yes. A. No, sir.

Q. Do you recall making a statement about that time [809] that Mr. Newport would boycott The Flintkote Company if they didn't stop selling to the plaintiffs? A. No, sir.

Q. Did you ever hear of such a statement?

A. No, sir.

Q. Did you ever attend any meeting of any kind with the other Flintkote contractors with respect to terminating the plaintiffs?

A. No, sir, I didn't.

Q. Was it ever reported to you that such a meeting took place?

A. No, it was not reported to me, if it did.

The Court: Did you ever hear of such a meeting?

The Witness: No, sir.

Q. (By Mr. Black): In the course of your contacts with the plaintiffs during all of this period, Mr. Ragland, did you ever hear of a bid allocating scheme or price fixing arrangement among the acoustical tile contractors in this area?

(Testimony of Robert Eugene Ragland.)

A. No, sir.

Q. Did you know whether The Flintkote Company during the period that we are now discussing sold decorative tile to acoustical tile contractors?

A. No, sir, they did not.

Q. Do you know if they sold wallboard direct to acoustical [810] tile contractors?

A. No, sir, they did not.

Q. What products did your company sell to acoustical tile contractors?

A. Our complete line of acoustical tile products includes four different thicknesses and four different sizes of perforated cane fibreboard, and all four of those were available to any acoustical contractor that we were doing business with.

Q. Was there any other products that were available on a direct basis at that time from The Flintkote Company to acoustical tile contractors from The Flintkote Company?

A. There was one product, an adhesive, Atlas adhesive, a cement used in holding tile to a ceiling. That was offered directly to the acoustical tile contractors.

Q. Was there anything else that was available to them on a direct basis? A. No, sir.

Q. Other than what you have mentioned?

A. No, sir.

Q. Did you ever discuss supplying decorative tile to Mr. Waldron in connection with their proposed operations?

A. I don't recall any discussion like that.

(Testimony of Robert Eugene Ragland.)

Q. Had you seen the aabeta company's office at Bell, California, prior to the time that you went down there in [811] response to Mr. Harkins' request that you make this investigation?

A. No, sir.

Q. Had anyone reported to you prior to your return from Seattle to Los Angeles that the plaintiffs were operating an office in Los Angeles?

A. No, sir.

Q. During this period did you see the plaintiffs rather frequently when they were getting established or starting their operations after the meeting with Mr. Harkins?

A. After the meeting with Mr. Harkins? You mean the termination?

Q. No, when they were taken on as distributors.

A. Yes, sir, I would say I saw them quite frequently.

Q. Where was your home at the time, Mr. Ragland?

A. In Van Nuys near the Birmingham General Hospital.

Q. And what route did you pursue in going home from your office or going to your office from your home?

A. Well, I came along Ventura Boulevard over Cahuenga Pass and that brought me a short block of Mr. Waldron's residence.

Q. Where was Mr. Waldron's residence?

A. It was on Holly Drive near Franklin Boulevard.

(Testimony of Robert Eugene Ragland.)

Q. I interrupted you. Go ahead.

A. Just off of Cahuenga Pass. [812]

Q. What did you say?

A. That location is just off of Cahuenga Pass in Hollywood.

Q. I think I interrupted you. May we have the last sentence?

(The record referred to was read by the reporter, as follows:)

"Q. No, when they were taken on as distributors.

"A. Yes, sir, I would say I saw them quite frequently."

Q. (By Mr. Black): Where did you see either of the plaintiffs during that period?

A. I would see Mr. Waldron at his residence, usually in the evening going home.

Q. Did you see Mr. Lysfjord in that period very often?

A. Not as frequently as Mr. Waldron. I talked to Mr. Lysfjord occasionally by telephone. [813]

Q. One more question that I perhaps may have not made myself clear on, or whether you answered or not I am not absolutely sure. Maybe you have answered this. If so, Mr. Ackerson will forgive me.

Did you ever see Mr. Krause at the Flintkote office in connection with aabeta co.'s operations?

A. No, sir, I didn't.

Q. Did you ever see Mr. Howard there?

A. No, sir.

Q. Did you ever see Mr. Hoppe there?

A. No, I didn't.

(Testimony of Robert Eugene Ragland.)

Q. Or any other representative of the acoustical tile contractors with whom Flintkote does business?

A. No, sir.

Q. Did you ever see any of those at the office?

A. I never have.

Q. Did you see any other acoustical tile contractor in the Los Angeles area with respect to aabeta co.'s operation at the Flintkote office?

A. No, sir, I didn't.

Q. At any time? A. Never.

Q. During this entire period. A. Never.

Mr. Black: You may cross-examine. [814]

The Court: Further trial of this case is continued until tomorrow at 1:30.

Mr. Black: If the Court please, may I ask the Court's indulgence. In a moment of weakness I accepted a position on a committee that Judge Zeeman is handling for the Welfare Federation, making a study of the welfare program. We are supposed to have a report on it tomorrow at a luncheon.

If it would be possible to meet at 2:00 it would enable me to attend that. It is not any desire of my own.

The Court: Surely, Mr. Black. I am just trying to get these cases——

Mr. Black: This thing is one of these public service jobs and I am afraid it would discommode these people if I couldn't attend, because they are relying on me.

The Court: Further trial of this case is continued until tomorrow at 2:00 o'clock.

(Testimony of Robert Eugene Ragland.)

Mr. Black: I would just as soon operate a half hour later if the jury and Court don't mind.

The Court: We might do that. We will see how we hold up tomorrow.

(Whereupon, at 4:00 o'clock p.m., Monday, May 16, 1955, an adjournment was taken to Tuesday, May 17, 1955, at 2:00 o'clock [815] p.m.)

Tuesday, May 17, 1955, 2:05 P.M.

The Clerk: Case No. 14,350, Elmer Lysfjord v. The Flintkote Company.

Mr. Ackerson: Ready for the plaintiffs.

Mr. Black: Ready for the defendant.

The Court: Let the record show the jury and alternate are present, plaintiffs present and defendant represented.

ROBERT EUGENE RAGLAND

called as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Ackerson: Had you finished direct, Mr. Black?

Mr. Black: Yes.

Cross-Examination

By Mr. Ackerson:

Q. You are now employed with Coast Insulating Products? A. That is correct.

(Testimony of Robert Eugene Ragland.)

Q. Who is the principal owner or maker of Coast Insulating Products, is that Mr. Newport?

A. Mr. William Binford.

Q. Who is Mr. Newport? What connection does he have with it?

A. To my knowledge he has no connection.

Q. He is not an owner? [817] A. No, sir.

Q. To your knowledge has he ever been connected with it?

A. I believe he owned the company at one time.

Q. What time was that?

A. Well, he owned the company, to my knowledge, when Flintkote first started selling him acoustical tile in 1951, until 19—sometime in 1953.

Q. Do you know whether or not he is still the owner, Mr. Ragland? A. I do not know.

Q. So you are not stating he is not still the owner? A. No, sir, I am not.

Q. All right. Now, who else? You said Mr. Binford? A. Yes, sir.

Q. Who else is connected with that company? Who else are your superiors?

A. Mr. Gus Krause.

Q. Mr. Gustav Krause is also there?

A. Yes.

Q. It has been stated in this trial, Mr. Ragland, that there were certain conferences between Mr. Newport and Mr. Krause—I mean with Flintkote and Mr. Newport and Mr. Krause? There is no doubt in your mind they are the same people, is there? [818]

(Testimony of Robert Eugene Ragland.)

A. If those conferences took place, they are undoubtedly—you are referring to the same people that I am, yes, sir.

Q. They all are now or have been connected with your present employer? A. Yes, sir.

Q. Now, I believe you stated on direct examination that you started in back in February of 1951 as an employee of Flintkote, in connection with insulation board products, is that right?

A. That is right.

Q. I believe you stated that by June 1, 1951, the same year, you then took a new position there. What was that, again?

A. That was acoustical tile sales and promotion.

Q. What was your title, if you remember?

A. I really never had a title. Field service engineer was the general classification.

Q. What was the principal duty you had? Wasn't it to sell as much Flintkote acoustical tile as you could, promote Flintkote acoustical tile?

A. In general, that——

Q. That was the main purpose of your job, wasn't it? A. Yes, sir. [819]

Q. Now it was about June and after you became sales promotional man for the Flintkote acoustical tile that you started having these more or less serious conversations with the plaintiff Lysfjord, wasn't it?

A. The more serious ones, yes, sir.

Q. Prior to that I believe you testified that it

(Testimony of Robert Eugene Ragland.)

was conversations with possibilities and desires, and so forth? A. Yes, that is correct.

Q. But when you became promotional agent for acoustical tile for Flintkote on June 1, 1951, then the conversations became serious?

A. Well, there was a degree of seriousness. Let's say I was in a position at that time where I might do more for these defendants than I could before.

Mr. Black: Plaintiffs you mean, Mr. Ragland?

The Witness: Plaintiffs. Excuse me.

Q. (By Mr. Ackerson): In other words, it was your job then, wasn't it, beginning June 1, 1951, that is, it then came into your sphere of operations with Flintkote, didn't it?

A. What came into my sphere?

Q. Well, the sale of acoustical tile. I mean, you were in a position then where you were in the same line they were interested in?

A. Yes, sir. [820]

Q. Is that right? A. Yes, sir.

Q. Now I believe you testified further that you had had a personal relationship with both the plaintiff Lysfjord and Waldron for some years prior to that, dating back to your Shugart Company days, is that right? A. That is right.

Q. And that was both a social relationship?

A. Yes, sir.

Q. And it was a personal relationship, wasn't it? A. Yes, sir.

Q. You saw them at lunches, you called at Mr. Waldron's home frequently on your way to and

(Testimony of Robert Eugene Ragland.)

from your own home? A. Yes, sir.

Q. And that continued on up until when, about the date of this termination meeting you had?

A. On and off, yes, sir.

Q. Quite frequently?

A. Possibly twice a week.

Q. Do you see Mrs. Waldron and her daughter in the courtroom today?

A. I wouldn't recognize her. I know he has a daughter.

Q. But Mrs. Waldron you do recognize?

A. Yes, I do.

Q. You have talked to her many times? [821]

A. Yes.

Q. And played cards with them many times?

A. Not many times, several times.

Q. Several times? A. Yes.

Q. You have been in her home many times?

A. Yes, sir.

Q. Now preliminarily, Mr. Ragland, I would like to ask you—I would like you to think about this answer—I want to ask you how many times you will state that you were over at the Atlantic address of the aabeta company prior to this termination meeting? A. At the maximum I was there twice.

Q. And will you state those two occasions? I imagine you can if it was only two times, couldn't you?

A. I was there the day, the Monday following my return from Seattle, when I was told to go and find the Bell location.

(Testimony of Robert Eugene Ragland.)

Q. And that was about at least within the first two weeks of February of 1952, is that right?

A. Sometime in that period.

Q. Now you are stating that that is the first time you were ever there? A. Yes, sir.

Q. The first time you ever knew the address existed? [822] A. Yes, sir.

Q. Now the second time was the termination meeting, I take it? A. Yes, sir.

Q. And you have never been there since?

A. No, sir. I was there after——

Q. Since the termination meeting?

A. Yes, sir.

Q. And when was that?

A. At the termination meeting Mr. Thompson had told the plaintiffs that Flintkote would allow them a week to 10 days to get in any additional orders they might have, and toward the expiration of that two-week or 10-day period no orders were forthcoming, and I went over, called up and went over, to find out if I might help them along or hurry those orders along. That is another time I was there.

We gave them an extension. They weren't quite ready to submit the orders, the additional orders, and after discussing the situation with Mr. Baymiller we gave them another week's extension on that original 10-day period.

Also I was over there after that meeting I just mentioned more or less on a friendly visit, trying

(Testimony of Robert Eugene Ragland.)

to recommend possibly a place where they might buy some more acoustical tile. [823]

Q. And that was how long after the termination meeting?

A. My second visit, oh, three weeks after the termination.

Q. Did you make a third visit then?

A. I don't recall, I could have, but I don't recall any more.

Q. Have you visited Mr. Waldron in his home since the termination meeting? A. No, sir.

Q. Played cards since then? A. No.

Q. Gotten together socially at all?

A. No, sir.

Q. So you would say prior to the termination meeting you were in that plant and knew of its existence, only because of two visits—I mean one visit prior to the termination meeting?

A. That is correct.

Q. Now, when you first started these conversations with Mr. Lysfjord, I believe you said it was, you had most of the early conversations with him, didn't you? A. That is correct.

Q. Now, they started in a serious vein about June 1st, when you became promotional manager or something in connection [824] with acoustical tile for Flintkote.

Did you indicate to Mr. Lysfjord, in view of your experience, as to his past experience in the field you would like to have him on Flintkote's team?

A. Words to that effect, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. You recognized that he did have contacts, did you not?

A. I recognized that he had a sales ability.

Q. And you recognized that he had spent a number of years here in the Los Angeles area creating good will with general contractors?

A. He had spent the last year or so with the Downer Company.

Q. You knew he was with other—salesman for Shugart prior to that?

A. No, he never was a salesman for Shugart.

Q. You knew he was a salesman prior to the time he came to Downer?

A. No, sir. I don't believe he ever was.

Q. Were you aware he did have a good record as a salesman for the Downer Company?

A. I believed what he told me. He said he had some——

Q. Well, did you know it of your own knowledge?

A. No, sir, I never knew it of my own knowledge; just what he told me. [825]

Q. You did check it later, though, didn't you?

A. To a degree, yes, sir.

Q. You found he was a good salesman, didn't you?

A. I found he had a degree of success, yes, sir.

The Court: Members of the jury, we have had some little colloquy here at times past about leading questions. Just a word about leading questions,

(Testimony of Robert Eugene Ragland.)

for the guidance of the witness, counsel and the jury.

It is the law generally that a person who calls a witness can't ask a leading question. A leading question is one of the type that Mr. Ackerson has just been asking, "You knew he was a good salesman, didn't you?"

All the witness has to do is yes the attorney or take issue with him and say no.

Well, leading questions are not permitted by a lawyer who calls a witness, except in extraordinary circumstances, because the witness ought to tell the story himself.

But now we have come to cross-examination and on cross-examination the rule of law is different. The reason for it is that this man is a witness, is an employee of the defendant. Sometimes a witness being cross-examined isn't an employee of the opposite side, but he, at least, has been called as a witness by that side.

On cross-examination he is being examined by the lawyer for the other side. It just seemed in law that being questioned [826] by the opposite side will put the witness in a position where he won't yes someone, without examining the inquiry pretty thoroughly in his mind, so that he will look out to see he doesn't fall into traps.

Hence, we are allowing the leading questions here on cross-examination. That being one of the immemorial—time immemorial rules of lawy, that the cross-examiner may ask leading questions.

(Testimony of Robert Eugene Ragland.)

So I just point that out to the jury. I think it was this jury that heard objection sustained to a lot of questions on the ground they were leading, and you might have wondered why we are allowing leading questions to be put by the opposition.

The reason is that it is the opposition and the witness is supposed to be on guard against them. I say that, also, for the benefit of the witness.

So, Mr. Witness, look out, you are being examined by the enemy now.

Mr. Ackerson: I think, Your Honor, you know I wouldn't lead anybody into a trap.

The Court: I don't mean by that it is anything unfair, that there is anything unfair about it.

Mr. Ackerson: I am being facetitious. Forgive me, Your Honor.

The Court: This case is being tried by leaders of the [827] Bar. Mr. Ackerson is considered, from the standpoint of people who bring this kind of suit, probably the leading expert in this part of the country, and Mr. Black, in behalf of the people who defend them, is regarded the same way. They are both lawyers of high integrity and considerable ability in their fields.

Q. (By Mr. Ackerson): Mr. Ragland, sometime subsequently after the termination you did contact the Downer Company, did you not, and inquire about the plaintiff Lysfjord and plaintiff Waldron's activities there? A. Yes, sir.

Q. You found, did you not, upon that inquiry, they were two of the top salesmen down there?

(Testimony of Robert Eugene Ragland.)

A. Yes, sir.

Q. You found their monthly commissions ranged from a thousand dollars upward, didn't you?

A. In that neighborhood, yes, sir.

Q. And you also found, in connection with Mr. Lysfjord, that the Downer Company offered him a much better position if he would stay, didn't you?

A. What do you mean by "a much better position"?

Q. Well, what did you find in that respect? I will let you state it.

A. They didn't want to lose him.

Q. They offered him a better deal if he would stay, [828] didn't they?

A. That is what he told me, yes, sir.

Q. That is what you were told at the Downer Company, wasn't it?

A. No, I don't believe I was told that at the Downer Company. [829]

Q. Now we start out, then, in these preliminary conversations between you and Mr. Lysfjord, that is, prior to this first Manhattan Club meeting that you have stated, have you not, that you did want these two men on the Flintkote acoustical tile team?

A. Yes, sir, I stated that.

Q. And you did feel that they were amply qualified? A. I felt that.

Q. And would do Flintkote a good job?

A. Yes, sir.

Q. And would aid Flintkote's sale of acoustical tile? A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. You knew also, didn't you, that the only experience or contacts either of them ever had as salesmen in the acoustical tile field were as salesmen in the Los Angeles field here, didn't you?

A. Yes, sir, I know that is the only place they had worked acoustically.

Q. Well, now, let's take this first meeting, after these preliminary conversations, most of which were had with Mr. Lysfjord. Then after you had been changed to this job as promotional man of acoustical tile for Flintkote, you did arrange this first meeting at the Manhattan Club with Mr. Baymiller, yourself and Mr. Lysfjord, did you not?

A. Yes, I did. [830]

Q. And I believe you stated that that was about September of 1951, and I am not holding you to this exact date? A. It could have been.

Q. It could have been September or October or sometime within 30 or 60 days? A. Yes.

Q. Now you met down there and, as I recall it, you said that the meeting took place during the lunch hour. How long was it, a 2-hour meeting? The lunch hour doesn't mean anything on a business meeting, I know that.

A. Approximately an hour.

Q. There were just three of you there?

A. That is correct.

Q. Now will you state again what you said at the meeting? Did you say anything at that meeting?

A. I introduced Mr. Baymiller to Mr. Lysfjord.

(Testimony of Robert Eugene Ragland.)

I told Mr. Baymiller that I had known Mr. Lysfjord at the Shugart Company. I told him I had heard of his sales activity at the Downer Company.

Q. What did you hear about his sales activity at the Downer Company that you told Mr. Baymiller?

A. I told him from what I had heard he was doing all right.

Q. Did you tell him he was one of the top salesmen down there? [831]

A. I don't believe I used the top salesman terminology. I told him he had turned into a fairly successful salesman.

Q. Did you tell Mr. Baymiller at this first meeting at the Manhattan Club that Mr. Lysfjord had a lot of contacts here with general contractors?

A. No, I don't believe I did.

Q. Did you tell Mr. Baymiller that Mr. Lysfjord had thrown work from the Hayden-Lee Company and Jackson Bros. Company to the Downer Company for the first time?

A. I don't recall that.

Q. You don't know whether you did or you didn't? A. That is right.

Q. Do you know how the Hayden-Lee Company is or what type of company they are?

A. I believe they are designer-builders, architect builders.

Q. Don't you know that they built one of the largest industrial, shall we call it, suburbs out here around Inglewood? A. Tract builders?

(Testimony of Robert Eugene Ragland.)

Q. Yes, tract industrial builders.

A. Well, a tract is not industrial. I thought they were more commercial builders, factory buildings and things like that.

Q. Yes, that is right. [832]

A. That is my understanding.

Q. And do you know that they did a great deal of work in the big area out around Inglewood for the airplane companies and various other industries? A. Hearsay knowledge, yes, sir.

Q. Do you know that those buildings had large amounts of acoustical tile?

A. I never was familiar with any particular job that they had built.

Q. Did you know that Mr. Charles S. Lee, who is the Lee of Hayden and Lee, was also a theater architect and built many theaters? A. No, sir.

Q. You did know, however, that they were important general contractors, didn't you?

A. One of many, yes, sir.

Q. Do you know anything about Jackson Bros. and their activities as general contractors?

A. I knew more about Jackson Bros. because I had contacted them when I was with the Shugart Company.

Q. Now tell us—let me ask you this—isn't it true that they are likewise engaged in commercial buildings of types that use a lot of acoustical tile?

A. Yes, sir.

Q. And didn't Mr. Lysfjord during this first meeting [833] at the Manhattan Club explain that

(Testimony of Robert Eugene Ragland.)

at least those contracts, that he had a good will with, he had sold them many times?

A. He may have said that.

Q. In fact, at this first meeting isn't it true that Mr. Lysfjord, in order to sell himself, was explaining to Mr. Baymiller what he could do in this area with these two clients, among others?

A. I don't believe that was his purpose.

Q. Did he say anything about it? Did he say anything about his ability to sell people like Hayden-Lee and Jackson Bros.?

A. He said that he had the ability to get into offices similar to theirs.

Q. And he had been in their offices and sold them? A. He had been in their offices, yes.

Q. And he named many other contractors too, didn't he?

A. I don't recall any other names. Those two I do.

Q. But at least in any event, and so far as Mr. Lysfjord's conversation was concerned, he was being the typical salesman to show Mr. Baymiller what he could do in the acoustical tile field by way of selling, wsan't he? A. Yes, sir.

Q. That was the main reason for him being there, wasn't it? A. Yes, sir. [834]

Q. And he was there at your instance to let Mr. Baymiller meet him, wasn't he?

A. That is correct.

Q. Because you wanted him on the Flintkote team? A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. Now tell us again what Mr. Baymiller said at this first meeting at the Manhattan Club.

A. Mr. Baymiller said that he was duly impressed by Mr. Lysfjord's sales ability, and he said that we were completely, all of our outlets were completely, filled right now in the metropolitan Los Angeles area, but we would like to set them up in some location outside of the Los Angeles area. I think Mr. Baymiller did mention Phoenix—in fact, I know he did—and he expressed genuine pleasure in meeting Mr. Lysfjord. [835]

Q. Now, let me ask you a couple of questions along that line.

Did Mr. Baymiller at any time during this meeting ask Mr. Lysfjord if he thought he could continue selling these clients under his own tutelage or his own business? A. No, sir.

Q. I don't believe you stated on your direct examination, but what it was Mr. Lysfjord said, if anything, when Mr. Baymiller is alleged to have said, "How about Phoenix?" Did he say Denver and Seattle and other places?

A. All the other places that have been mentioned were mentioned.

Q. Tell us what Mr. Lysfjord said.

A. Mr. Lysfjord said he would make an investigation and take a trip to Phoenix and see what he thought of it.

Q. What did he say about Denver, Seattle?

A. He said he didn't know anything about them.

(Testimony of Robert Eugene Ragland.)

Q. So your statement is Mr. Lysfjord expressed an interest in Phoenix, anyway, is that right?

A. Yes, sir.

Q. Isn't it a fact that Mr. Lysfjord said that he had been in business only in Los Angeles and he wasn't interested in moving out of Los Angeles?

A. I don't recall that.

Q. You don't know whether he did or he didn't? [836] A. No, sir.

Q. Well now, in your direct examination I believe you said that Mr. Baymiller at this meeting said or mentioned the terms of Reeder Co., Acoustics, Inc., and Bolstin. A. Bolster.

Q. Bolster? A. B-o-l-s-t-e-r.

Q. Bolster Company. By the Reeder Company you meant L. D. Reeder, didn't you?

A. Yes, I did.

Q. At that time, in 1951, L. D. Reeder Co. was already in the acoustical tile business, wasn't it?

A. Yes, they were.

Q. What brand of tile did they handle?

A. Armstrong.

Q. Armstrong is a competitive line with Flintkote, isn't it? A. Yes, sir.

Q. It is A.M.A. approved? A. Yes, it is.

Q. So that if L. D. Reeder Co. got a contract or bid on a contract, as far as Flintkote was concerned, and to use the vernacular, they could thumb their nose at Flintkote tile and put in Armstrong, couldn't they, with equal advantage to them? [837]

A. If the architect would accept it.

(Testimony of Robert Eugene Ragland.)

Q. Have you ever known an architect that would accept Flintkote and not accept Armstrong tile?

A. Yes, sir.

Q. Under what conditions?

A. One of the biggest architects in town, the Welton Becket office today, who have no other acoustical tile except cane fiberboard.

Q. Are there other cane fiberboards?

A. Celotex.

Q. Celotex? A. Yes.

Q. You say today. This architect firm, how long has that been going on? Do you mean to say they specify only fiberboard or only——

A. Cane fiber.

Q. ——cane fiber? A. Yes, sir.

Q. How long has that been going on?

A. This is on private work and as long as I have ever known of that organization.

Q. Now, what about public work. Is there any such specification, for only Flintkote tile, that you know of, on public works?

A. On all public work you have to have an approved [838] A.M.A. material.

Q. Any A.M.A.-approved material will meet the specifications, won't it?

A. If it meets what the architect wants.

Q. Yes. But the architect wants an A.M.A.-approved acoustical tile.

A. He may specify a certain absorption at a frequency and if, we will say, one A.M.A. material

(Testimony of Robert Eugene Ragland.)

can't meet it and another one can, he will take the one that does.

Q. All right. Will Flintkote tile meet any different A.M.A. test than any other tile, any other A.M.A.-approved tile, I mean?

A. At certain frequencies, yes, sir.

Q. Did you ever have any sales experiences with The Flintkote Company or with the Shugart Company in connection with public works?

A. In the Shugart Company I handled limited public works in the San Bernardino-Riverside territory.

Q. How many contracts would you say you ever bid on in public works for the Shugart Company?

A. Possibly 15 or 20.

Q. Possibly 15 or 20 public works?

A. Yes, sir.

Q. Then I take it that up until you recently severed your connection with The Flintkote Company, and went to Coast [839] Insulating, that was the limit of your experience with public works?

A. Actively bidding, yes.

Q. Yes. Actively selling. A. Yes.

Q. Now, you also mentioned Acoustics, Inc., at this first meeting, or you said Mr. Baymiller did?

A. Yes, sir.

Q. What type did Acoustics, Inc., sell at that time? What was their contact?

A. They had a contact at that time with the Fir-Tex Company.

(Testimony of Robert Eugene Ragland.)

Q. Fir-Tex is likewise a competitive A.M.A.-approved tile, isn't it?

A. When they make it, yes, sir.

Q. Acoustics, Inc., had that line at the time, didn't they? A. Yes.

Q. Now, the Bolster Company is just a plastering company? They have never been in acoustical tile?

A. Just like Acoustics, Inc.; they are plasterers, too.

Q. But at that time they had had acoustical tile experience with Fir-Tex, hadn't they?

A. Yes.

Q. But the Bolster Company had never been in the [840] acoustical tile business, had they, to your knowledge?

A. Not in the tile business. They applied acoustical plaster and limpet.

Q. By acoustical plaster, do you mean Dry-Wall or something like that?

A. No, I mean a plaster aggregate that foaming agent is added to and they hose it on or it is blown on, and it has the comparable sound-absorption qualities that a tile has.

Q. You would call that of the type or belonging to the family of the acoustical tile?

A. You will see that name in the phone book under Acoustics.

Q. In your knowledge, you would call that type of operation as being in the acoustical tile family, at least, wouldn't you? Is that what you are saying?

(Testimony of Robert Eugene Ragland.)

A. That is an acoustical operation.

Q. And whether you call it tile or not it is an acoustical member of the acoustical family, right?

A. That is right, yes.

Q. Now, at that time, in September or October, 1951, when you and Mr. Baymiller—by the way, Mr. Baymiller's position is what, or was what with the Flintkote Company at that time?

A. He was assistant to Mr. Thompson, assistant sales manager to Mr. Thompson. [841]

Mr. Thompson, in turn, was the sales manager of the Southwest District, which comprises Southern California, from Fresno south, and Arizona, Colorado, New Mexico, and the several counties surrounding El Paso, Texas.

Q. Just so we might clear a little point up here, when you say "Southern California," did Flintkote, as distinguished from Fresno, did Flintkote consider Southern California as any area south of the Tehachapi Mountains? That is a usual designation in a lot of industries. Do they use that?

A. I guess the Chamber of Commerce would have a better connotation of what you mean by that.

Q. Flintkote meant south of Fresno, is that right?

A. Yes, sir, that is Mr. Thompson's territory.

Q. All right. Now, at this time, in September or October, 1951, Flintkote had three Flintkote outlets for acoustical tile, did it not?

A. In the metropolitan Los Angeles district.

(Testimony of Robert Eugene Ragland.)

Q. Well, south of Fresno—or, I will take your statement. In the Los Angeles County.

A. We had three.

Q. Three. And that was Sound Control, Howard—— A. And Coast Insulating. [842]

Q. Now let's take those three. Do you know what competing A.M.A.-approved tile Mr. Howard had at that time?

A. He had U. S. Gypsum and he had Flintkote.

Q. Did he have any others that you know of?

A. No, sir.

Q. As a matter of fact, Mr. Howard has been handling U. S. Gypsum acoustical tile long prior to the time he took on Flintkote, didn't he?

A. That is my understanding, yes, sir.

Q. Now the other one was Sound Control. What other tile did Sound Control handle in September or October of 1951?

A. National Gypsum and Flintkote.

Q. And both of them were A.M.A.-approved?

A. Yes.

Q. Both competitive?

A. Both competitive as far as they went.

Q. All right. On public works, then, both Mr. Howard and Sound Control, as far as Flintkote is concerned, could have turned all their contracts over to National Gypsum and U. S. Gypsum, couldn't they? Or did you have an arrangement, an amicable arrangement, about being fair and dividing the proceeds or something?

A. No, sir. We had no arrangements to my

(Testimony of Robert Eugene Ragland.)

knowledge. They would not be able to turn over all their business, we will say Hoppe to National Gypsum and Howard to U. S. Gypsum, [843] because the two lines I just mentioned are limited in their sizes. Flintkote had made more thicknesses and more of the larger sized units which these two manufacturers did not make.

Q. Well, on that point, Mr. Ragland, can we agree that your principal acoustical tile item, say your most important item, is the 12x12 one-half inch thickness, isn't it?

A. That is the item we sell the most of.

Q. What is the thing you sell the most of next?

A. Three-quarter inch 12x12.

Q. And what is the next important item on your acoustical tile list that you sell?

A. From memory I would say the 24x24 one-inch and half-inch.

Q. Now, does U. S. Gypsum make those three kinds of tile?

A. They make the first two.

Q. The two most important ones they make, you know that?

A. I can't say for sure if they make a 12x12 perforated. They make a slotted, and may make a twin tile which is a 12x24 cross-scored to simulate a 12x12 unit.

Q. It could be substituted for a 12x12 unit that Flintkote makes?

A. It could be substituted, that is right.

(Testimony of Robert Eugene Ragland.)

Q. And you don't know whether they make the actual same [844] model as Flintkote does?

A. That is right.

Q. You don't know that, do you?

A. I can't say for sure whether they do.

Q. Then we can say, can't we, Mr. Ragland, that the Howard Company could have substituted U. S. Gypsum for any contract they had in those three important matters, those three important sizes?

A. Except for the large 24x24 inch size.

Q. And it is your opinion that U. S. Gypsum Company didn't make a 24x24 perforated tile?

A. That is correct.

Q. So that then you are referring to the fact that the Howard Company had to sell at least 24x24 inch Flintkote tile? A. Yes, sir.

Q. Other than that though they could have said —we don't care about Flintkote, we will make a penny more or a penny less on the U. S. Gypsum and we will cut Flintkote out, couldn't they, and there is nothing you could have done about it, was there? A. No, sir.

Q. Now would the same thing be true with Sound Control? A. As to the sizes, yes, sir.

Q. In other words, Sound Control's other source of [845] supply manufactured the same three basic sizes you mentioned?

A. No, they didn't. I don't believe the National Gypsum people make a large size, either, 24x24.

(Testimony of Robert Eugene Ragland.)

Q. But that is the only size that you believe National Gypsum doesn't make?

A. That is right.

Q. Therefore, Sound Control could have substituted at its will National Gypsum tile and ignored Flintkote tile on anything except 24x24, is that right, at least on the three sizes?

A. That is partially right if the architect didn't specify cane fiber.

Q. But you never heard of an architect specifying cane fiber in public works, did you?

A. Oh, yes.

Q. Have you? A. Oh, yes.

Q. Can you name an instance?

A. Or equal?

Q. Or equal? A. Or equal.

Q. But "or equal" is anything that is A.M.A.-approved, isn't it?

A. If it meets what the architect has specified.

Q. But the architect says fiber tile A.M.A. or equal, and [846] I am asking you the "or equal" means a tile that has A.M.A. approval, doesn't it, in public works?

A. Well, you are asking a lot of generalities there. Architects and contractors have differed for years on that "or equal" clause. If an architect so deems that he doesn't like the color of the paint finish or the way the holes are drilled, that they are not clean or the bevels don't run true, he might say, you haven't got an equal even though the material does have an A.M.A. approval.

(Testimony of Robert Eugene Ragland.)

Q. Mr. Ragland, you say he may say that. Name me some particular instance or illustration where an architect has been able to say that and make it stick with the general contractor who let the bid to the acoustical tile contractor. Can you name any instance along that line?

A. I can't name you a specific instance right here now, but I will bring you a nice list.

Q. Where an architect in drawing up specifications for a public building has said, we want fiber tile or equal, and an A.M.A.-approved tile was not acceptable as an equal to the general contractor?

A. Yes, sir.

Q. I would like to have that list, if you have one.

Now, the other Flintkote outlet—we have covered Howard and Sound Control—what about Coast Insulating, your present employer. What other acoustical tile do they handle other than [847] Flintkote?

A. Simpson Logging Company material.

Q. What specifications do they manufacture? Do they manufacture 12x12 one-half inch?

A. 12x12 one-half inch, and 12x12——

Q. Three-quarter inch?

A. ——three-quarter inch.

Q. 24x24?

A. Recently they have started the large sizes.

Q. How recently?

A. To my knowledge, within the last year.

Q. Prior to that then we have the same situation there that as far as Coast Insulating Products is

(Testimony of Robert Eugene Ragland.)

concerned on the two fast moving items, let's say, they could have substituted Simpson tile instead of Flintkote tile, couldn't they?

A. Yes, sir.

Q. And you had no way of making them give you an even break on the sales or anything, did you?

A. Well, to my knowledge we received an equal break. We had no high pressure salesmanship or anything like that. [848]

Q. Do you know how——

Mr. Ackerson: I am not going to move the answer be stricken as not responsive, Your Honor, but I am going to ask it again:

Q. (By Mr. Ackerson): What is your knowledge based on, that you got an even break with Coast Insulating? Do you have any such knowledge, or is that a guess?

A. It would be a guess, based upon the amount of footage we sold to them.

Q. Do you know how much footage Coast sold for Simpson Company? A. No, sir.

Q. So that you then don't really know whether Coast was given Flintkote, or, has given Flintkote a decent break or not, do you?

A. It satisfied our management and our mill is well satisfied with the production.

Q. How do you know your management was satisfied or your mill was satisfied? How do you know? What do you base that statement on?

A. I was told.

Q. Told by whom?

(Testimony of Robert Eugene Ragland.)

A. I was told that—I assume when I am told I am doing a good job that—by my superiors, that our sales are adequate. [849]

Q. But no superior ever told you that, "We are getting an even break with Coast as against Simpson, Howard as against U. S. Gyp or Sound Control as against National Gypsum," did they?

A. No, not in my presence, anyway.

Q. They never told you that?

A. It never arose.

Q. In the Los Angeles area, did you have any outlet that handled only your own tile, that pushed that exclusively? A. No, sir.

Q. You never have had, have you, to your knowledge?

A. I believe The Flintkote Company once sold Degan & Brodie. That is the only tile they had, to my knowledge.

Q. That was before you came to the company, wasn't it? A. Yes.

Q. Are they still in existence?

A. I believe they are.

Q. They don't handle Flintkote?

A. No, sir.

Q. At any rate, I believe you stated, in effect on direct examination, that they never—and we are not being impolite, but lawyers have a habit of calling people by their last names. It doesn't mean any impoliteness or lack of respect, but we all have that habit and we can't help it.

So, at any rate, Baymiller at this first meeting

(Testimony of Robert Eugene Ragland.)

at [850] the Manhattan Supper Club mentioned these three or four companies, Reeder—the three I mentioned, Reeder, Acoustics, Inc., Bolster Company.

Do you mean to say he placed those—he stated to these plaintiffs that as far as the Los Angeles area was concerned they were ahead of these plaintiffs?

A. That is, in substance, what he meant, yes, sir. Did I mention the Uranga Company?

Q. No, you didn't. What is the company?

A. Uranga.

Q. Uranga? A. Yes.

Q. What is it?

A. It is the name of a man, Henry Uranga, operating in the San Fernando Valley. He was quite persistent at that time.

Q. How did he operate? What did he operate?

A. He operated his own acoustical business.

Q. He had never handled Flintkote?

A. Never had, no, sir.

Q. Did you mention or, did Mr. Baymiller say that Mr. Uranga in the San Fernando Valley would be ahead of these people, too?

A. Yes, sir.

Q. Was anything said? What did you say? [851]

Let's take what Mr. Lysfjord said after Mr. Baymiller is alleged to have said that.

Do you remember what Mr. Lysfjord said?

A. I don't recall specifically. I can give you generalities, but you don't want that.

(Testimony of Robert Eugene Ragland.)

Q. Well, give me the substance of what he said.

A. He was quite agreeable.

Q. He was quite agreeable these people should be ahead of him here?

A. He was agreeable that we were well accommodated in Los Angeles, and he was petitioning us for a supply of material and he was willing to go along with whatever terms we could arrange.

Q. Did he at this meeting, at any time ever state to you, or to Mr. Baymiller, that he wanted to do business any place other than in Los Angeles County, at this meeting? Did he ever state that at this meeting?

A. He stated he would investigate the Phoenix area.

Q. That you are positive of? A. Yes, sir.

Q. All right. Now, do you know when Acoustics, Inc., started in the acoustical tile business, Mr. Ragland? That was a plastering concern, too, wasn't it?

A. Yes, it was.

Q. Do you know when they started in the acoustical tile [852] business?

A. I would venture a guess; sometime in 1950.

Q. Very late, wasn't it? Only about a year before these people tried to get in, wasn't it?

A. I guess that is true.

Q. Do you know what tile they handled when they first started?

A. They had no acoustical tile when they started. They had this sprayed-on material that I mentioned that Bolster had, another brand. They had a product called Insulrock.

(Testimony of Robert Eugene Ragland.)

I will ask the question: Did he ever tell you, or to your knowledge, anybody of Flintkote that he would quit handling Flintkote if these people continued in business? By "these people" I mean the plaintiffs. [855]

A. No, he didn't tell me that.

Q. Well, to your knowledge did you hear that he told that to Mr. Lewis down there or Mr. Thompson? A. No.

Q. Or Mr. Baymiller?

A. No, sir, I didn't.

Q. Or Mr. Harkins? A. No.

Q. When did Mr. Hoppe quit handling Flintkote?

A. I would say toward the end of 1952.

Q. And after Mr. Hoppe—are you sure of the date? And have you any better estimate than that?

A. No, I am not sure of the date. It seems to me that that was—that is pretty accurate, though. [856]

Q. You don't know whether the last order he placed, you don't know the date of the last order he placed with Flintkote, do you?

A. No, I don't.

Q. Well, let's get on to the meeting again at the Manhattan Club, the first meeting between you, Baymiller and Lysfjord. Have you stated in your cross-examination all you remember about Baymiller's, yours or Lysfjord's conversation there?

A. I believe I stated everything that I can recall anything specific about.

No. 15005

United States
Court of Appeals
For the Ninth Circuit

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

Transcript of Record
In Three Volumes

Volume III
(Pages 853 to 1270)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-13-56

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(Testimony of Robert Eugene Ragland.)

Q. Well, I might suggest a couple of other things. And I realize you can't remember everything. The question, have you stated everything is rather an unfair question when you are on the witness stand, whether your counsel asks it or I do.

But isn't it true at that time, after Lysfjord had told you of his sales ability in the immediate area here, didn't you or Mr. Baymiller suggest that there would be a subsequent meeting held at which Mr. Thompson would attend, and didn't you suggest that Mr. Lysfjord bring along something to prove his sales ability in the form of actual contracts or such?

A. Did I say that?

Q. Yes. A. No, sir. [857]

Q. Did Mr. Baymiller suggest that?

A. No, sir. If that was said, Mr. Lysfjord suggested it himself.

Q. Well, do you recall Mr. Lysfjord suggesting that he could prove his statements by signed contracts? A. No, sir.

Q. You do recall, though, that at a subsequent meeting, the next succeeding meeting, he did bring a portfolio of signed contracts?

A. I recall that.

Q. Now you stated on direct that Mr. Baymiller at this meeting stated after Lysfjord had told him about Hayden-Lee, Jackson Bros., or whatever other contractors he mentioned, your direct testimony was that Mr. Baymiller said, "Yes, but you can't continue to sell them if we give you the line." Is that the substance of what you said?

(Testimony of Robert Eugene Ragland.)

A. That is right.

Q. "You can't operate in Los Angeles, that is definite"? A. That is very definite.

Q. Well, when you left this Manhattan Club meeting, this luncheon meeting, was there any understanding that you would arrange a future meeting?

A. It was a general understanding that it was nothing definite as to a date or a place. [858]

Q. But there was an understanding, was there not, Mr. Ragland, that both you and Mr. Baymiller still felt it was a good idea to have Lysfjord and Waldron on your team, didn't you?

You said yes? You nodded your head.

A. I don't like the use of that word "understanding" because I have been criticized for using it.

Q. It was the feeling that you would have a future meeting?

A. That was the discussion between Mr. Baymiller and myself, yes, sir.

Q. I have a right to ask you how you felt, Mr. Ragland. A. I see.

Q. At that time did you still feel that you wanted Waldron and Lysfjord on the Flintkote team?

A. I continued to feel that way, yes, sir.

Q. And have you any reason to believe that Mr. Baymiller at that time felt the same way, after talking with Lysfjord? A. Yes, sir.

Q. Then I take it you did have—when you got

(Testimony of Robert Eugene Ragland.)

back to the office did you talk with Mr. Thompson?

A. I don't recall if he was in or not. If he was we did briefly.

Q. But whether it was when you first got back or otherwise, [859] you did talk to Mr. Thompson about the meeting at the Manhattan Club?

A. We had to discuss it with him, yes, sir.

Q. I am going to leave this meeting at the Manhattan Club, the first one, after one more question, which is repetitive probably but I want to make it clear.

During any part of that meeting do you now state that Mr. Baymiller did not ask Mr. Lysfjord if he could continue selling these Los Angeles accounts if he got a Flintkote line?

A. He did not.

Q. He did not? A. He did not.

Q. All right.

Then you get back to the office and either that day or the following day or the next day you did contact Mr. Thompson of the Flintkote Company?

A. Yes, sir.

Q. Who did, you and Mr. Baymiller, did the three of you sit down and talk?

A. I don't recall that contact. I was outside of the office most of the time. Possibly when I returned to pick up mail or literature or something of that nature, Mr. Baymiller and Mr. Thompson and myself got together and had the discussion.

(Testimony of Robert Eugene Ragland.)

Q. Do you recall such a discussion, Mr. Ragland? [860]

A. No, I don't recall it specifically.

Q. You don't recall having talked with Mr. Thompson yourself, I mean you yourself having talked to Mr. Thompson about this meeting?

A. No, sir, I don't.

Q. Do you recall prior to the second meeting at the same place having recommended the plaintiffs to Mr. Thompson as Flintkote outlets?

A. I can't specifically remember it. Undoubtedly I did.

Q. You must have?

A. I must have, that is correct.

Q. You wanted them on your team and you recommended them very highly whenever you could, didn't you? A. That is true.

Q. Now, do you know whether or not Mr. Baymiller had such conversation with Mr. Thompson? By "such conversation" I mean, do you know whether or not Mr. Baymiller related the facts of the first Manhattan Club meeting or made recommendations?

A. I don't know for sure if he did or not.

Q. But you do know that within 10 days or two weeks after the first meeting you had another meeting out at the Manhattan Club at which Mr. Thompson attended, don't you?

A. That is right. [861]

Q. And whether it was 10 days or two weeks or

(Testimony of Robert Eugene Ragland.)

12 days isn't important, Mr. Ragland, but it was about in that period?

A. Probably more a month.

Q. Now, at this meeting, Mr. Ragland, yourself, Mr. Baymiller, Mr. Thompson, Lysfjord and Waldron were present. How was that meeting arranged? Did you arrange it?

A. I believe I did by telephone.

Q. In other words, your recollection is you called Mr. Lysfjord, who was still with the Downer Company, and Mr. Waldron who was still there at that time, wasn't he?

A. I contacted one or the other because the one would give the message to the other.

Q. Yes. And you arranged this second luncheon meeting at the Manhattan Club?

A. Yes, sir.

Q. Will you tell us how that took place, I mean, did you all arrive together, did the three Flintkote people arrive together, or just what happened?

A. I believe Mr. Thompson, Mr. Baymiller and myself left from the Flintkote offices to the designated spot, and Mr. Waldron and Mr. Lysfjord came in their respective cars separately. I don't know if we were there first or they were there, or how it was. We all got together. I am sure I was the man that made the introductions, and after the introductions I was more or less in the background. [862]

Q. Well, in making the introductions, did you

(Testimony of Robert Eugene Ragland.)

indicate that you knew the sales ability of these two people that you wanted on your team?

A. I believe I had stated that, yes.

Q. You recommended them to Mr. Thompson at this meeting? A. Yes, sir.

Q. And did Mr. Baymiller say anything?

A. No, I believe Mr. Baymiller was listening quite as much as I was, too.

Q. He had more or less heard it at the prior meeting, hadn't he? A. That is right.

Q. But at this meeting Mr. Lysfjord did bring this portfolio of signed contracts?

A. Yes, he did.

Q. Which he was giving to the Downer Company? A. Yes.

Q. And isn't it true that Mr. Thompson was quite impressed with that type of business?

A. Well, that is a question Mr. Thompson will have to answer. It seemed to me—there again it is supposition—it seemed to me like he was.

Q. Did he say so?

A. I can't recall his exact words. I can give you what [863] he might have said.

Q. Let me say, didn't he say, in effect, that this is wonderful, do you think you can keep this up, and so forth?

A. I can't speak for Mr. Thompson again on that.

Q. No, I am asking you if Mr. Thompson said something in your presence at this meeting to that effect, Mr. Ragland, not what was in his mind.

(Testimony of Robert Eugene Ragland.)

A. It doesn't seem to me like he said words like that. He said something to that effect. He said undoubtedly—I don't believe Mr. Thompson is a man that is easily impressed.

Q. But he was impressed with these contracts that Lysfjord had picked up within a few days, wasn't he?

A. To be polite he might have been.

Q. Well, he stated he was, that is what I mean. He said, "This is wonderful, can you keep it up," or something to that effect, didn't he?

A. Possibly he did; yes.

Q. Now had you indicated to Mr. Thompson either at this meeting or prior thereto that you wanted Waldron and Lysfjord on the Flintkote acoustical tile team?

A. I didn't hear the first part of your question.

Q. Had you stated, either prior to this meeting or at this meeting, or did you indicate at this meeting, that you still wanted Waldron and Lysfjord on the acoustical tile team of Flintkote? [864]

A. I did.

Q. At all times you recommended them very highly to whoever you talked to?

A. Every chance I got.

Q. Every chance you got, that is right.

So that at this meeting you had Mr. Thompson, who was general sales manager, was he not—he was above Mr. Baymiller?

A. He was above Mr. Baymiller, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. And Mr. Baymiller was assistant sales manager? A. Yes, sir.

Q. And Thompson was sales manager?

A. Yes, sir.

Q. And you were promotion man for acoustical tile in the area? A. Yes, that is right. [865]

Q. Now, Thompson saw these contracts, of course, that Lysfjord brought, didn't he?

A. Yes, sir, he did look at them.

Q. Now, this meeting, I believe you stated, lasted during the lunch hour and for about an hour thereafter. I take it that would be about two hours, wouldn't it?

A. An hour or an hour and a half, something like that, I guess.

Q. Hour and a half, maybe two hours. Now, do you recall or don't you recall, Mr. Ragland, that at this meeting, the first meeting Mr. Waldron attended, he told Mr. Thompson that there would be some stiff opposition if they were given Flintkote line of tile?

Do you recall a statement like that from Mr. Waldron? You have had a chance to think of it since the other day. A. No.

Q. Do you recall it? A. No, I don't.

Q. You don't recall whether Mr. Waldron made such a statement? A. No, I don't.

Q. And you don't recall then, I take it, whether he, in connection with the same statement, said something to the effect—and I am stating this generally, just like you have to state conversations—

(Testimony of Robert Eugene Ragland.)

he said something to the effect that [866] these acoustical tile contractors were not competing and gotten together and they would apply pressure when a new competitor came in the field? Do you recall that statement or something to that effect?

A. No, sir, I don't.

Q. Then, of course, I take it you don't recall whether or not Mr. Thompson, in response to such a statement, said that Flintkote wouldn't be subject to pressure. That it was a big company and they made up their own mind, and so on? Do you recall Mr. Thompson saying anything like that?

A. No, sir.

Q. Now, you don't recall anything about Mr. Thompson saying Flintkote couldn't be pressured, or anything of that sort?

A. No, sir, I don't recall the use of the word "pressure" at any time.

Q. Do you recall Mr. Thompson saying that, in effect, if they accepted these people as outlets, that whatever pressure came from competing contractors wouldn't affect them, that is, Flintkote could take care of itself, that it was a big company? If you don't follow my words, I just want that thought. Did Mr. Thompson express that thought?

A. No, I don't recall any expression of that nature.

Q. You just don't recall. All right. Now, do you recall—you stated on direct examination that Mr. Thompson, [867] after I assume he had seen these nice contracts that Lysfjord exhibited, did he say

(Testimony of Robert Eugene Ragland.)

anything about—at that meeting, the second meeting that Lysfjord would no longer be able to continue to sell these people if he got Flintkote tile? Did Mr. Thompson ever make such a statement at that meeting? A. No.

Q. Those contracts that he exhibited, do you recall the contractors?

A. Jackson Brothers, I recall definitely.

Q. Hagen-Lee?

A. Hagen-Lee may have been included, I don't recall.

Q. There were a few others, were they not, Mr. Ragland? A. There may have been.

Q. At that meeting, isn't it a fact, Mr. Ragland, that either you or Mr. Baymiller or Mr. Thompson, any one of you, expressed in words a satisfaction that if the plaintiffs became Flintkote dealers they would be the only exclusive outlet Flintkote had?

A. If they made the statement, which I don't recall, it would have been a false one.

Q. You have testified, haven't you, that you had no other outlet in this area that handled exclusively Flintkote tile?

A. You referred to Los Angeles?

Q. Yes. That is true, anyway, isn't it, in the Los [868] Angeles County area, that they would have been the only outlet handling exclusively Flintkote tile?

A. If we had intended them to work in Los Angeles, they would have.

(Testimony of Robert Eugene Ragland.)

Q. Was anything said along that line?

A. No, sir.

Q. You don't recall, or do you say no?

A. No.

Q. And to make it certain, Mr. Thompson didn't make any statement like that? A. No.

Q. You didn't? A. I didn't.

Q. And Mr. Baymiller didn't. A. No.

Q. Now, you stated you didn't recall the preliminary question to this, Mr. Ragland. But do you recall any conversation of Mr. Thompson at this meeting to the effect—after he had seen these contracts—to the effect that maybe Lysfjord would be able to sell those people, providing they couldn't be sold otherwise by someone else?

A. I believe he made a remark similar to that. I don't recall the exact words he used.

Q. That was your direct testimony, anyway, wasn't it?

A. Yes, he would take a look at anything of that nature [869] that did arise.

Q. After he had determined that, nobody else would sell them? A. Yes, sir.

Q. If no other acoustical tile contractor could sell it, he would decide whether or not Waldron and Lysfjord might take a crack at it, is that the gist of what you meant to say yesterday?

A. That could have been, yes.

Q. That could have been what you meant to say yesterday? A. Yes.

Q. All right. Then I take it that what Mr. Bay-

(Testimony of Robert Eugene Ragland.)

miller, by the words you heard, that he would rather have Armstrong, Celotex, U. S. Gyp, National Gyp, anybody sell these big contractors, rather than let these people sell Flintkote tile?

Mr. Black: That is objected to as assuming a fact not in evidence. It is argumentative, furthermore, rather than a direct question.

Mr. Ackerson: I want to know whether that was his understanding.

The Court: Objection sustained.

Q. (By Mr. Ackerson): Now, is there anything else that you remember stated at this second meeting at the Manhattan Supper Club? Did you say anything else? Did Lysfjord say [870] anything else? Did Waldron say anything else?

A. Lysfjord mentioned the fact that he would like to buy a fishing boat to entertain future customers; that I recall.

Q. What did anybody say in response to that suggestion? A. "Good idea."

Q. And—very well. You didn't think, Mr. Ragland, he was going to park a fishing boat up at San Bernardino, did you?

A. Well, there is a man out there now that has one down there.

Q. All right. But the fishing boat was brought up? A. Yes, sir, it was.

Q. For the entertainment of customers?

A. Yes, sir.

Q. Mr. Thompson and Mr. Baymiller said they thought that was a good publicity idea?

(Testimony of Robert Eugene Ragland.)

A. Yes, sir.

Q. At that meeting didn't Mr. Lysfjord or Mr. Waldron also bring up the idea of stationery, listing products and activities on the border and——

A. The only thing I recall in connection with advertising was an emblem they thought they would like to use at that time. It was the comedy and tragedy emblems you see so much on theatre programs. [871]

I guess it was assuming that if they got a job they were happy and if they didn't they were unhappy.

Q. They discussed advertising on the stationery, anyway, didn't they?

A. That is what I recall.

Q. Yes. Well now, we have covered this second meeting. Then what happened, Mr. Ragland? How did the meeting break up? What was decided, if anything?

A. One of the things that it broke up on was that—I recall going to my car and getting—or, the car that Mr. Baymiller and Mr. Thompson and I came in, and getting a piece of literature to give to Mr. Waldron, who at that time I don't believe had that piece of literature.

Q. Do you recall what the literature was about?

A. It must have been an acoustical tile brochure that we use, Flintkote uses.

Also, Mr. Thompson stated that he would consider the presentation that these two gentlemen had made

(Testimony of Robert Eugene Ragland.)

to us and would advise them when a future meeting was necessary.

Q. Well, could you state from the general tenor of the meeting, the way it broke up, that these two boys were prettly likely to be on the Flintkote team? Did you agree to talk it over with Mr. Harkins, as the final word?

A. Mr. Thompson would have talked it over with Mr. Harkins, yes. [872]

Q. In other words, when Mr. Thompson left that meeting he wanted these people on his team, too, didn't he?

A. That is the impression he gave me.

Q. All right. After the meeting, then you went back to the office, I take it? A. Yes, sir.

Q. Did you report to Mr. Harkins?

A. No, sir.

Q. When did you report to Mr. Harkins, if you did?

A. I don't think I ever did. Mr. Thompson would arrange that.

Q. Well, what happened next?

A. After a period of time, possibly another month, I was told that a meeting had been arranged to introduce these two plaintiffs to Mr. Harkins.

Q. At that time were you informed that they had been approved as acoustical tile, Flintkote acoustical tile dealers?

A. No, I was not informed.

Q. Did you know that otherwise, from Mr. Thompson?

(Testimony of Robert Eugene Ragland.)

A. I had every reason to believe they would be, but I had no cognitive certitude they were.

Q. That was the purpose of meeting Mr. Harkins, was it?

A. Yes, sir; final approval, yes.

Q. You say this was maybe a month after the second meeting? Could it have been two weeks, ten days? [873]

A. It could have been any lapse of time. I am sure it was—let's say from ten days to a month.

Q. It was before the 2nd or the—it was before the 1st of December, 1951, in any event, wasn't it?

A. It could have been. [874]

Q. Did you arrange this meeting with the plaintiffs, this third meeting?

A. I did the telephoning, yes, sir. I telephoned them at the Downer Company and told them that the way was clear for them to meet Mr. Harkins, and could they make the date, and I was given an affirmative answer, and they came down to the office.

Q. Did you tell them on that telephone conversation, them or one of them, that they had been accepted? A. No, sir.

Q. What time of day was this meeting, Mr. Ragland?

A. I believe around 11:00 o'clock in the morning.

Q. Well, I take it then they arrived together at the Flintkote offices? A. I believe they did.

Q. And did they proceed to your office, Mr. Thompson's office, or Mr. Baymiller's office?

(Testimony of Robert Eugene Ragland.)

A. I believe I was informed by the switchboard girl that they were out in the lobby, and I went out and got them and brought them back to our general sales office.

Q. Would that be yours and Mr. Thompson's and Mr. Baymiller's?

A. No, Mr. Thompson had his own office. Mr. Baymiller had an adjoining office. The salesmen using the office had one large community desk out in front of those offices. [875]

Q. Then I take it you took them to this community desk, is that right? A. Yes, sir.

Q. Then what happened? Did you subsequently take them next into Mr. Baymiller's office?

A. No. As soon as I saw that Mr. Thompson wasn't busy, I caught his attention and we let Mr. Harkins' secretary know that the two men were present.

Q. Who is she?

A. I don't recall her name.

Q. Is it Miss Dobkins?

A. No. I don't recall her. It wasn't Dobkins. Dobkins was the switchboard girl.

Q. Go ahead. Tell us what happened. You took them first to the general salesmen's desk.

A. And when we were told that Mr. Harkins was free, Mr. Thompson and I escorted them over to Mr. Harkins' office and introduced them.

Q. Let me stop you there just a minute.

You mean to say that neither of the plaintiffs

(Testimony of Robert Eugene Ragland.)

talked with Mr. Thompson nor Mr. Baymiller prior to them being escorted to Mr. Harkins' office?

A. Oh, certainly. They were greeted.

Q. What were the salutations? You are in, you are part of the team now, congratulations? [876]

A. No, there was nothing like that. The opportunity is here. Mr. Harkins is free. Let's go talk to him.

Q. You mean that until these people got in Mr. Harkins' office they didn't know they had been accepted as Flintkote acoustical tile dealers?

A. No, sir.

Q. At that time, Mr. Ragland—may I see your copy of that financial statement, Mr. Doty—these people, the plaintiffs, brought a financial statement at either your, Mr. Baymiller's or Mr. Thompson's request at the prior meeting, did they not?

A. Yes, they did.

Q. May I show you this and ask you if this is the financial statement that was brought—your counsel has handed it to me.

We can state that, can't we, Mr. Black, for the witness' benefit?

Mr. Black: I think that is correct.

Mr. Ackerson: That this came from the Flintkote files?

Mr. Black: As far as we know, it is the one that we had.

Q. (By Mr. Ackerson): Do you recognize that as the financial statement?

(Testimony of Robert Eugene Ragland.)

A. (Examining Exhibit): I can't swear that it is the same one.

Q. But you saw a similar financial [877] statement?

A. That is just about how I looked at it because it wasn't my job to look at them.

Q. This has your name on it. Is that your writing? A. No, sir, that isn't my handwriting.

Q. But you have seen this when it was brought in that day, didn't you?

A. Yes, sir, if that is the same one.

Mr. Ackerson: Do you mind if I ask that this be marked for identification? You have no further use for it, Mr. Black?

Mr. Black: We may want to refer to it.

Mr. Ackerson: I will mark it only for identification unless we can stipulate it is identical to Plaintiffs' Exhibit——

Mr. Doty: It is not identical so we better put it in.

Mr. Ackerson: I would like to ask to have it marked for identification.

Mr. Black: No objection.

The Clerk: That will be Plaintiffs' Exhibit 44 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 44 for identification.)

Q. (By Mr. Ackerson): Now, Mr. Ragland, did you yourself take—let's get the chronology here—the plaintiffs came in, they stood at your general

(Testimony of Robert Eugene Ragland.)

sales desk, Mr. Thompson came out to greet them, did he? [878] A. Yes.

Q. Did Mr. Baymiller likewise come out?

A. I don't recall Baymiller at that meeting.

Q. Now, then, you stated that you and Mr. Thompson escorted them into Mr. Harkins' office?

A. Yes, sir.

Q. Was Mr. Harkins what we call in the vernacular the top boss down there in your field?

A. He was the top man as far as I was concerned, yes, sir.

Q. He was what, he was general sales manager?

A. He was general sales manager of the Pioneer Division.

Q. For the 11 western states or something?

A. Yes.

Q. For all building materials?

A. All building materials, yes, sir.

Q. Now are you sure you took these people into Mr. Harkins' office?

A. I am quite sure I was present, yes, sir.

Q. And did you remain there during the time that these people remained in Mr. Harkins' office?

A. That question has been asked of me before. I am not sure if I did or not. I think I did.

Q. Well, yesterday—if I am mistaken here, Mr. Ragland, correct me; my memory isn't infallible—but I understood [879] you to testify yesterday as to conversations between plaintiffs and Mr. Harkins taking place in Mr. Harkins' office on this occasion. A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. Are you positive of that? A. Yes, sir.

Q. Now was Mr. Thompson likewise in there?

A. Yes, he was.

Q. Did he remain all the time you did?

A. To my knowledge, yes, sir.

Q. You mean to your recollection or to your knowledge? A. To my best recollection.

Q. Now to your best recollection, did you both remain in there, or either of you remain in there, all the time the plaintiffs were in Mr. Harkins' office? A. I believe we did.

Q. Well, tell us what occurred in Mr. Harkins' office. I take it you made introductions, this is Mr. Lysfjord and Mr. Waldron?

A. Yes, I did that.

Q. Did you also say that these are the two new accounts that we have been talking about?

A. I told them that these were the two men we had talked about to him, and that they were to be our new applicators in the San Bernardino-Riverside area. [880]

Q. Did you remain in there and hear Mr. Harkins talk about this Ryan Aircraft job out near Pomona?

A. No, I don't recall any Ryan Aircraft job.

Q. Do you know, Mr. Ragland, whether or not Flintkote sold the roofing on that job?

A. No, sir.

Q. You don't remember anything about Mr. Harkins mentioning that job?

A. No, sir, I don't.

(Testimony of Robert Eugene Ragland.)

Q. Will you state that Mr. Harkins then did not say to these plaintiffs that they should get the pencil sharpened and go out and figure on the acoustical tile on that job?

A. I would like to give you an answer on that.

Q. Well, do you remember such a conversation? Then if you want to explain it, you can.

A. It isn't at all logical that that conversation or that statement was ever made.

Q. Well——

The Court: Can you remember whether it was made or not?

Q. (By Mr. Ackerson): Was it made?

A. No, I don't recall anything like that.

Q. You don't remember either for certain whether you were in there all the time the plaintiffs were in there, do you? [881]

A. I can't say that I was, but I do remember.

Q. And you didn't mean yesterday to say that you were there all the time they were in there either, did you?

A. To the best of my recollection what I said yesterday was true.

Q. Well, did you say yesterday that your best recollection today is that you were in there all the time? A. I think I was, yes, sir.

Q. Well, now, tell us how this Mr. McAdow—he is your credit manager down there, isn't he?

(Testimony of Robert Eugene Ragland.)

A. Yes, sir.

Q. He came into this picture at some stage, didn't he? Was that before you went into Mr. Harkins' office or after?

A. That was after the Harkins meeting.

Q. And I take it that you took this Plaintiffs' Exhibit 44 for identification, the financial statement, and it was given to Mr. McAdow, wasn't it?

A. That is correct.

Q. And your statement yesterday was that Mr. McAdow took it, congratulated these people and said something about he hoped he would see them again, or something to that effect?

A. Words to that effect.

Q. Well, now, Mr. Ragland, I seem to recognize this handwriting. It might be Mr. Doty's, I don't know.

Mr. Doty: It is not mine. [882]

Q. (By Mr. Ackerson): Do you recognize the "Bob Ragland" that is written here, whose handwriting that is? Is that Mr. McAdow's?

A. I don't know.

The Court: What are you showing him?

Mr. Ackerson: I am showing you Plaintiffs' Exhibit 44 for identification and the longhand notation on the first inside page.

The Witness: I understand what you are showing me. [883]

Q. Yes, I know. The record has to show it. I am just trying to help you.

(Testimony of Robert Eugene Ragland.)

The Court: We just want our stenographic record here to be complete.

The Witness: No, I don't recognize the handwriting; it is my name.

Q. (By Mr. Ackerson): This was in your possession, of course, at one time or another after this meeting you are talking about, wasn't it?

A. I don't believe that was ever in my possession.

Q. You now are saying you never saw this before? A. I saw it on Mr. McAdow's desk.

Q. Let me ask you this then, Mr. Ragland: This document, this financial statement, Plaintiffs' Exhibit 44 for identification, was expressly requested by Mr. Thompson at the previous meeting?

Mr. Black: Pardon me. The reporter can't get a nod, Mr. Ragland.

The Witness: Yes.

Q. (By Mr. Ackerson): And it was produced at the next subsequent meeting with Mr. Harkins at this time, as a result of that request?

A. I don't recall if Mr. Harkins saw that or not.

Q. No. But it was produced at the Flintkote offices at this time? [884]

A. At the concurring meeting, yes, sir.

Q. Now, as promotional man for acoustical Flintkote tile you know that it was important for Flintkote to know the financial standing of these people before you agreed to sell them tile, didn't you?

A. Yes, I know that it is important to have some money if you are going to buy anything.

(Testimony of Robert Eugene Ragland.)

Q. And you had to find out, Flintkote had to find out whether these people had anything?

A. Yes; very particular about that.

Q. It is also true Mr. Thompson would want to know before he would recommend it to Mr. Harkins?

A. Very definitely.

Q. And Mr. Harkins would want to know before he said, "Okay, you are in," wouldn't he? Or else he would want Mr. Thompson's word for it.

A. He would want Mr. Thompson's word.

Q. Yes. So that, I take it, you would say, at least, that either yourself, Mr. Baymiller, Mr. Thompson, after requesting this document, Exhibit 44 for identification, at least examined it, didn't you?

Can you refresh your recollection on that?

A. No, I don't recall examining that myself. I don't recall Mr. Thompson examining it.

Q. Well, as an employee in promotional, or, and [885] promotional manager, a promotional man for acoustical tile for Flintkote, and having gone through all these negotiations, would you state had they found, had anybody in Flintkote found, after examining this document (indicating), that the financial structure wasn't adequate that they would have approved and shipped the first carload of tile? A. They would not.

Q. They would not, would they? A. No.

Q. They had to examine this document before they would go out on a limb for $6,000 carload of tile, wouldn't they? A. Very definitely.

(Testimony of Robert Eugene Ragland.)

Q. Now, I am going to call your attention to the fact that this financial statement we are talking about, Plaintiffs' Exhibit 44 for identification, I want you to examine that and see if you can tell me any reference to San Bernardino or Riverside in that document? A. The only——

Q. Address or otherwise.

A. There is only one thing that connotes any geographical location, and that is the word "Arizona" down here (indicating).

Q. What does that say?

A. "Frank M. Hamiel, Public Accountant, Arizona 3—" That is his telephone number. [886]

Q. That is the accountant's address?

A. Yes, sir.

Q. Let me see if I can direct your attention to something else right on the front cover, "aabeta co., Los Angeles." Isn't that on there in capital letters?

A. It is now.

Q. I assure you I have never seen this document until today, so it must have been on there when you received it. A. I am sure it wasn't.

Mr. Ackerson: Well, Mr. Black, you didn't——

The Court: Let's be certain. I am not sure we all heard the witness' answer.

Will you read it, please?

(The answer was read.)

Mr. Ackerson: I am sure you didn't put "Los Angeles" on this, Mr. Black, after it came into your possession.

(Testimony of Robert Eugene Ragland.)

The Court: Let's be certain we have identified on the document what the witness said wasn't there when he first saw it.

Mr. Witness, put a circle around it with this red pencil, so it can be properly identified.

(Witness complies.)

Q. (By Mr. Ackerson): You are identifying the words "Los Angeles" under "aabeta co." on the front of the cover page of Plaintiffs' Exhibit 44 for identification? [887] A. Yes.

Q. You are certain those two words were not there when you saw it?

A. I am positive they weren't.

Mr. Ackerson: Well, I would like——

The Court: You are speaking as of the time you last saw it, before you came to the stand today, or as of some other time?

The Witness: No, I know they weren't there when we first were handed that manuscript.

Mr. Ackerson: Well, I would like the record to show, or, Mr. Black to stipulate, that the first time I saw this document was yesterday, and the first time it has ever been in my hands is today.

I would like to have him stipulate further that he received it directly from Flintkote Company.

Will you do that, Mr. Black?

Mr. Black: I so stipulate. I don't know when you saw it before——

Mr. Ackerson: I think it was yesterday or the day before.

(Testimony of Robert Eugene Ragland.)

Mr. Black: I know Mr. Doty was negotiating with you on documents a long time.

Mr. Ackerson: I have never seen that before, have I, Mr. Doty?

Mr. Doty: Not that I know of. [888]

Mr. Ackerson: I have never had it in my hands until today?

Mr. Doty: Not that I know of.

Mr. Ackerson: So far as you know, Mr. Doty, you got it directly from Flintkote and it has at all times been in your hands since then?

Mr. Doty: As far as I know, that is right.

Q. (By Mr. Ackerson): Now, neither Mr. Harkins—or did either Mr. Harkins, Mr. Thompson, Mr. McAdow or Mr. Baymiller ever question or ever bring up the fact to you that this Plaintiffs' Exhibit 44 for identification listed the aabeta co.'s address as Los Angeles instead of San Bernardino? Was that ever called to your attention, until right now, today? A. No, sir.

Q. Nobody ever mentioned it? A. No.

Q. Now, Mr. Ragland, you stated yesterday, in response to Mr. Black's questions, certain answers concerning this job that the plaintiffs did for Owens Roofing Company? A. Yes.

Q. As I recall it, you said a man named Anderson—— A. That is correct.

Q. ——who is a salesman or employee of Owens Roofing——

A. No, Flintkote employee. Flintkote salesman.

Q. Anderson was the Flintkote roofing sales-

(Testimony of Robert Eugene Ragland.)

man. [889] A. Yes, sir.

Q. I see. He came into your office and Mr. Lysfjord happened to be there, is that right?

A. As I recall it, that is what it was.

Q. Do you recall whether that was in December or January, or when?

A. I believe I recalled yesterday that was between Christmas and New Year's.

Q. At that time, of course, Mr. Lysfjord was still finishing up with the Downer Company?

A. Still employed by the Downer Company.

Q. Anyway, your story went as follows—correct me if I am wrong—Mr. Lysfjord happened to be in the Flintkote offices at the time Anderson came in?

A. Yes.

Q. Anderson said, in substance, that the Owens Roofing Company wanted an acoustical tile job, is that right?

A. They wanted to purchase some material, acoustical tile material.

Q. What did you say to Mr. Anderson?

A. I told him he would have to—we couldn't sell, The Flintkote Company as a manufacturer couldn't sell a roofer acoustical tile directly. He would have to buy it through one of our contractor outlets, such as R. E. Howard.

Q. Then you said that and not Mr. [890] Baymiller? A. It was stated by both of us.

Q. You both said it? A. Yes.

Q. Well, tell us what—did Mr. Baymiller stay there all the time Lysfjord was talking about this?

(Testimony of Robert Eugene Ragland.)

A. No, I don't believe Mr. Baymiller did. He is always quite busy when he is in the office and the occasion for his coming out to that particular desk was the knowledge that Mr. Lysfjord was present and he came out to give him a greeting.

Q. Welcome him into the family? A. Yes.

Q. Anyway, you are sure you said, "No, you have to go to Howard, or somebody"?

A. That is right.

Q. Well, all right. Then I believe you stated Lysfjord said, "I would like to have that job"?

A. "I would like to do the work."

Q. "I would like to do that job"? A. Yes.

Q. And did you then state, "Well, this is a chance to pick up a few dollars while you are getting organized"?

A. Yes. I said that "Here is a chance to make an extra twenty-five or fifty dollars, while you are still getting organized in your new company." [891]

Q. Did you say $25 or $50?

A. Yes, sir. That is wages, $25 a day.

Q. But you did say, "Go ahead and apply the tile"?

A. No, I didn't say that. I took him down with Mr. Anderson. I had never heard of Owens Roofing Company before.

Q. Let's get it straight. After Lysfjord said, "I would like to do this job," you took Lysfjord and you went down to Owens Bros. Roofing, is that right? A. Yes, sir, with Mr. Anderson.

(Testimony of Robert Eugene Ragland.)

Q. I believe you stated you talked to the senior Mr. McLane down there?

A. I believe that was the man, yes.

Q. And you had never met him before?

A. No.

Q. Are you sure it wasn't Mr. McLane, Jr., the son?

A. No, I am not sure. I have since questioned Mr. Anderson and he told me it was Senior.

Q. At the time you testified yesterday, did you know that Mr. McLane, Sr., was deceased?

A. Yes, sir, I did.

Q. You don't know for certain whether it was Mr. McLane, Sr., or Mr. McLane, Jr.?

A. Only Mr. Anderson's statements to me.

Q. But you did talk to a Mr. McLane?

A. Yes, sir. [892]

Q. I am going to show you a letter, Mr. Ragland, and I am going to ask you if this refreshes your recollection.

Mr. Ackerson: I will ask it be marked Plaintiff's Exhibit for identification in order.

The Clerk: Plaintiff's 45 for identification.

(The document referred to was marked Plaintiffs' Exhibit 45 for identification.)

Mr. Black: Isn't that the 1954 letter?

Mr. Ackerson: That is right.

Q. (By Mr. Ackerson): Now I show you a letter that is addressed to aabeta co., Plaintiffs' Ex-

(Testimony of Robert Eugene Ragland.)

hibit 45 for identification, purporting to have been signed by R. James McLane.

Can you tell from that letter, after reading it, whether or not you talked to the signatory of that letter or the other McLane on there, listed on the letterhead? A. No, I can't tell you. [893]

Q. But are the contents of that letter substantially correct? A. No, sir.

Q. Did you recommend aabeta company to do that job?

A. I recommended them to put the material in, yes, sir.

Q. Well, that is substantially what the letter says, isn't it?

A. I have seen this letter before.

Q. Well, I know, but what is your answer? Are the contents substantially correct? Did you recommend——

A. There are a number of things in that letter that are not true.

Q. Well, is the fact that you did recommend the aabeta company to the Owens Company true?

A. I recommended two men to put the job in, yes, sir.

Q. Two men, Lysfjord and Waldron?

A. That is right.

Mr. Ackerson: I am going to offer this at the present time, your Honor, Plaintiffs' Exhibit 45 into evidence.

Mr. Black: Objected to on the ground there is no foundation laid. This is a letter of 1954.

(Testimony of Robert Eugene Ragland.)

The Court: I do not think the date of it is controlling on whether it is admitted or not, but I do not recall, as I sit here now, what foundation there is for admitting this particular letter. [894]

Mr. Ackerson: Your Honor is right, and I think Mr. Black is right. I will have to lay a further foundation. I will leave it for identification until later.

The Court: All right. What is the number?

The Clerk: No. 45.

Mr. Ackerson: Plaintiffs' Exhibit 45 for identification, your Honor.

Q. Now, Mr. Ragland, let's get on to this first—prior to that, is Mr. Harkins still with the Flintkote Company? A. No, sir, he is not.

Q. When did he leave?

A. To the best of my knowledge I believe it was approximately March, 1954.

Q. Let us get to this first order of tile, Mr. Ragland. Your testimony was to the effect that both plaintiffs came to the Flintkote offices and presented an order for a carload of tile, and you recall you said they were very proud, it was their first order, is that right? A. Yes, sir.

Q. And that was a written order, a signed order, wasn't it? A. Yes.

Q. That is the custom for Flintkote, isn't it, to have a signed order any time they sell a carload of tile? [895]

A. It is the general practice, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. Is that signed order ordinarily put in the folder of the customer and kept as a record?

A. It is usually attached to the original order.

Mr. Ackerson: Have you been able to find that record yet, Mr. Doty?

Mr. Doty: No.

Q. (By Mr. Ackerson): Did you have anything to do with trying to find that original order by the aabeta company? A. No, sir.

Q. You don't know whether a search was made for it or not?

A. I am sure a search has been made. I don't have anything to do with the orders.

Q. Did you know whether or not the order was ever found? A. No, sir, I don't.

Q. You did state yesterday, though, that you personally examined this order?

A. I believe I did, yes, sir.

Q. Well, they brought it in and showed it to you, you said? A. That is right.

Q. And do you recall that the order had an order number [896] on it, aabeta order number?

A. It didn't have the words "aabeta" on it; it was a standard purchase order blank, I guess that you can buy at any dime store or stationery counter.

Q. Who was it signed by?

A. I don't recall.

Q. Either Lysfjord or Waldron?

A. One of the two, yes, sir.

Q. Or the aabeta company? A. Yes, sir.

Q. Now you stated yesterday also that you per-

(Testimony of Robert Eugene Ragland.)

sonally advised the plaintiffs as to what the fastest selling sizes of tile was, and you said three-quarter inch 12 x 12 and one-half inch 12 x 12, didn't you?

A. Yes, sir.

Q. And that that was the extent of your participation in initiating this first order of tile?

A. Yes, sir.

Q. Now isn't it a fact, Mr. Ragland, that you contacted the plaintiffs and said, in effect, "Look, our plant in Hilo is going to be shut down for repairs, you had better get an emergency order in here so you will have something when you need it"; didn't you tell them about the shutdown at Hilo?

A. I could have told them, yes. That was [897] common knowledge.

Q. But you didn't remember that yesterday?

A. I don't recall.

Q. Well, now, let me ask you this, Mr. Ragland: As a matter of fact, it is true, isn't it, that you called one of these people, Mr. Waldron—in fact it was Mr. Waldron—at the Bell address on Atlantic Boulevard and made an appointment for the purpose of initiating this first order of tile?

A. I couldn't have done that.

Q. Is your answer no? A. No.

Q. And will you state that Mr. Lysfjord came into that meeting from the Downer Company and met you at the Bell Avenue address?

A. No, I won't state that.

Q. It is not true, you say?

(Testimony of Robert Eugene Ragland.)

A. It is not true, that is correct.

Q. And is it not true that after the three of you met at the Bell Avenue address on Atlantic Boulevard you went from there to this Plantation Inn instead of from The Flintkote Company, as you stated yesterday?

A. No, the way I stated it yesterday was chronologically correct.

Q. So you still stand on your testimony?

A. Yes, sir. [898]

Q. That you never were at the Bell plant or never knew of its existence until sometime in February when you were investigating rumors, is that right? A. That is absolutely correct.

Q. Well, then, you state in accordance with your yesterday's testimony, your testimony of yesterday, that these two plaintiffs came in with a signed order blank—did you advise them before or after that about what the sizes to order?

A. I advised them before, by telephone.

Q. Mr. Ragland, either of these two people then had had a great deal more experience in sales of acoustical tile than you had at that time, isn't that true? A. No, sir.

Q. They hadn't sold more contractors tile than you had up to that time?

A. That would be a matter of comparison.

Q. Well, they had at least sold enough tile as top salesmen for Downer Company, and before that Coast and Shugart, to know which tile sold the fastest and was needed the most, didn't they?

(Testimony of Robert Eugene Ragland.)

A. No, I don't think so.

Q. It is your statement that they didn't know from their own experience that you sold mostly one-half inch 12 x 12 and the next three-quarter inch 12 x 12 tile?

A. They could have supposed that from their experience, [899] what they were selling the most of, but I don't believe either one of them were ever in a position to do any ordering before. That is usually management's job in acoustical contractors' organizations.

Q. Mr. Ragland, without arguing the point, they were as experienced in what contractors were putting in buildings, at least as experienced as you were, through their past sales experience; were they not?

A. Well, I am not going to say that they were inferior to me in any respect. They had had selling experience, and so had I.

Q. Didn't they ask you about what sizes to purchase in this first carload of tile or did you volunteer?

A. No, they requested my assistance as to the composition of a car.

Q. By the composition of a car, what do you mean?

A. What would be the most expedient material for them to lay in a warehouse as a first order.

Q. They asked you for the advice you state and you gave it to them? A. Yes, sir.

Q. Now you don't remember today, then, for

(Testimony of Robert Eugene Ragland.)

certain whether you told them about the Hilo plant going to be closed down for repairs or not?

A. I don't recall telling them that, though it is very [900] possible I did.

Q. So then I take it that your testimony, by your testimony of yesterday you didn't mean that these people just came in here with a signed order, proudly but unexpectedly, and said, "Fill it"?

A. No, I didn't, or I didn't mean to convey that idea.

Q. Well, the Hilo plant did close down, didn't it? A. I imagine it did, yes, sir.

Q. Well, I will show you——

May I have this marked Plaintiffs' for identification next in order?

The Clerk: Plaintiffs' Exhibit 46.

(The document referred to was marked Plaintiffs' Exhibit No. 46 for identification.)

(Exhibiting exhibit to counsel.)

Mr. Ackerson: May I offer this without foundation, Mr. Black?

Mr. Black: Yes, of course.

Mr. Ackerson: I will offer this in evidence as Plaintiffs' Exhibit 46.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 46.)

(Testimony of Robert Eugene Ragland.)

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 46, Mr. Ragland, and [901] ask you if that refreshes your recollection as to whether the Hilo plant did close down?

A. (Examining exhibit.)

Q. Does that refresh your recollection?

A. That is undoubtedly a fact, yes, sir.

Q. So that if you failed to state yesterday that you apprised these plaintiffs of the fact that the plant may close down, it was an inadvertence, is that your testimony today?

A. That is right.

Q. Now, Mr. Ragland, if I tell you that Mr. Lewis of your company—who is he, S. M. Lewis, I think it is?

A. Mr. Lewis is the assistant to Mr. Harkins at that time, assistant sales manager of the Pioneer division, building materials.

Q. And he stands in between Harkins and Thompson, I take it?

A. That could be the placement.

Q. If Mr. Lewis made the statement that this first order of Flintkote tile by the plaintiffs was phoned in, or must have been phoned in, your testimony is that he is mistaken? You saw the order?

A. I saw the order, yes, sir. [902]

Q. I am going to show you another document.

Mr. Ackerson: Can we have this marked Plaintiffs' 46 for identification?

The Clerk: Plaintiffs' 47.

Mr. Ackerson: 47, I beg your pardon.

(Testimony of Robert Eugene Ragland.)

(The document referred to was marked Plaintiffs' Exhibit 47 for identification.)

Mr. Doty: May we see that?

Mr. Ackerson: I beg your pardon.

Q. (By Mr. Ackerson): Can you identify this document, Plaintiffs' Exhibit 47 for identification, Mr. Ragland?

A. That is the literature that was available to our acoustical tile distributors at the time of this alleged operation.

Q. I want to ask you, Mr. Ragland, did you give such literature as this or some such literature as this to the plaintiffs or to either of them? Did you supply aabeta co. with this?

A. I am sure I did, yes, sir.

Q. Isn't it a fact, Mr. Ragland, that you mailed this document, or this type of document, Plaintiffs' Exhibit 47 for identification, to the aabeta address, the Bell address of plaintiffs' business at the aabeta co.?

A. Certainly didn't. It is five minutes driving time over there; I would have taken it. [903]

Q. You mean you would have driven over five minutes, rather than putting a postage stamp on it?

A. Surely.

Mr. Ackerson: I will offer it. Any objection, Mr. Black?

Mr. Black: No objection.

The Court: Received.

(Testimony of Robert Eugene Ragland.)

(The document referred to marked Plaintiffs' Exhibit 47, was received in evidence.)

Q. (By Mr. Ackerson): Now, let's go ahead on this first order of tile. You stated that according to your recollection the plaintiffs came down there? A. Yes, sir.

Q. Anything else happen? Who was there besides yourself?

A. I am sure I took the order in to Mr. McAdow, with Mr. Lysfjord and Mr. Waldron, for his credit approval on it.

Q. Now, you are positive that you took Mr. Waldron and Mr. Lysfjord along with their signed order into Mr. McAdow? A. Yes, sir.

Q. What did Mr. McAdow do?

A. Mr. McAdow said, what did I think of these two people. He said, "Anyone can prepare a statement like this. Do you believe they will pay their bills?" [904]

Q. In front of them? Did he state that while these plaintiffs were right there?

A. To the side, not—he wouldn't do that in front of them, naturally.

Q. While they were in his office?

A. Well, yes, sir. He said "Do you believe they will pay their bills?" He said, "In cases of this kind, where the finances are limited and a new organization starting out," he said, "do you believe that they will pay their bills?"

I said, "Yes, I do believe they will."

(Testimony of Robert Eugene Ragland.)

So he okayed it.

Q. In addition to the financial statement, which he had seen, certainly, by this time——

A. Yes.

Q. ——and in addition to a signed order blank, he still wanted assurance before he would ship a carload of tile, is that right?

A. That is right. He is a very cautions man.

Q. By the way, Mr. Ragland, when you were a salesman for Downer, what was your sales number?

A. For Shugart?

Q. No, for Flintkote. I mean, did you have a sales designation?

A. No. 90. I received my inner office correspndence by No. 90. [905]

Q. 90 or 9? A. 90, nine zero.

Q. Nine zero. Do you know anybody as No. 9? Was there such a salesman as No. 9?

A. There very definitely could have been one of the line salesman, one of the roofing men. I don't know any 9.

Q. It wouldn't have been any acoustical tile salesman for Flintkote?

A. I was the only acoustical tile salesman. 9 designation is for fiberboard up and down the coast.

Q. Your number was 90? A. Nine zero.

Q. There was nobody in your department, a salesman as No. 9?

A. There certainly could have been; I don't know him.

(Testimony of Robert Eugene Ragland.)

Q. But you wouldn't know him? You don't know him today, do you?

A. Whoever No. 9 happened to be, I would probably know him. What I mean is that 9 means nothing to me.

Q. Could 9 mean 90?

A. Not unless it says "90."

Q. Let me ask you this: Did you turn in the first Flintkote order for aabeta co.? It was handed to you. Did you turn it in to Mr. McAdow? [906]

A. Yes, sir, I did.

Q. All right. Then, let's see, I have an exhibit here.

Mr. Ackerson: I will ask it be marked for identification.

The Clerk: Plaintiffs' 48 for identification.

(The document referred to was marked Plaintiffs Exhibit 48 for identification.)

Q. (By Mr. Ackerson): Now, do you recognize this document, Plaintiffs' Exhibit 48 for identification?

Mr. Doty: Do you want the original?

Mr. Ackerson: What is that?

Mr. Doty: I say, do you want the original in lieu of that photocopy, which is a little bit illegible?

Mr. Ackerson: I think that this is all right. Thanks, Mr. Doty. We might substitute, if it is necessary.

The Witness: I believe this is an original order.

Q. (By Mr. Ackerson): That is your original

(Testimony of Robert Eugene Ragland.)

order? A. Flintkote's.

Q. Flintkote's original order? A. Yes.

Q. Do you see here, is there any place on that order that lists the customer's order number?

A. 2351, yes, sir. (Indicating.)

Q. Now, can you identify any of the handwriting on that? A. No, sir. [907]

Q. On that order blank? A. No, sir.

Q. Is any of it Mr. McAdow's?

A. Possibly, it could be.

Q. Any of it yours?

A. No, there is no—none of my writing or printing on that.

Q. Now, you turned this order in, didn't you?

A. Yes, sir.

Q. Aren't you the salesman listed on this order, salesman 9? A. No, sir.

Q. If there wasn't any other 9 salesman that would have been 9 or 90, either one, wouldn't it?

A. I would much rather receive $90 than $9. There was—my number, my sales number never appeared on an order. Everything I sold was a house account. It was credited to Mr. Thompson's sales or Mr. Maynard Felig in the San Francisco district or Mr. Schultz in the Seattle territory, when I was in those territories. Nothing ever would——

Q. Who was it credited to here, when you brought in an account?

A. A house account, it would go into the southwest district territory.

Q. Nobody got a credit for it? [908]

(Testimony of Robert Eugene Ragland.)

A. I was not on a commission basis.

Q. This sales number was merely—what purpose did it serve? Was this a territory then in 9, salesman 9? A. No.

Q. Would that be southwest territory?

A. I can't explain the 9 on it.

Q. Unless it might have been 9 for 90?

A. The salesman we might have had in the San Bernardino territory.

Q. Do you know the salesman, as promotion chief did you know the salesman in the San Bernardino territory?

A. No. It is Mr. Davies. He is still there.

Q. What was his designation? Is it 9?

A. I don't know. We can find that out very easily.

Q. Did you see this document prepared?

A. No, sir, I didn't.

Q. Who prepares this document in your office, this type of document?

A. I believe it is prepared by our order department and I believe the man at that time was Joe Askins; A-s-k-i-n-s.

Q. Is Mr. Askins, do you recognize his handwriting any place here?

A. No, I don't know him well enough to.

Q. I call your attention to the fact that aabeta co.'s shipping instructions here call, first for 1085 Pacific [909] Avenue, and then it is changed in one place to 901 Waterman Street. And that latter address is what you saw in San Bernardino, isn't it?

(Testimony of Robert Eugene Ragland.)

A. 901 North Waterman, yes, sir.

Q. You saw the original order. Do you recall what address was on that original order? Was it the Pacific Avenue address?

A. I don't believe there was any address on the first order. And when Mr. McAdow was presented this order——

Q. By you? A. By Mr. Askins.

Q. I see. Then you don't know, you weren't there, or were you there?

A. I showed him the order. He said, "Fine. That is good. Will you vouch for these people?"

And I said I would.

He said, "Okay." And Mr. Askins was told to type up this order and as he did it Mr.—it was sent back to Mr. McAdow for his approval. [910]

Q. And you observed this?

A. No, sir, I don't observe that routine, that paper work.

Q. I see. You are telling the regular routine?

A. Yes, sir.

Q. But your statement is that the original order blank had no address on it, is that right?

A. I don't believe it had.

Mr. Ackerson: I will offer this.

Mr. Black: No objection.

The Court: Exhibit 48 is now offered into evidence. Any objection?

Mr. Black: No objection.

The Court: Received.

(Testimony of Robert Eugene Ragland.)

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 48.)

Q. (By Mr. Ackerson): Now, I take it, Mr. Ragland, that we have at least clear that you might have mentioned this closing of the Hilo plant in connection with this first order?

A. It is logical that I did, yes, sir.

Q. But you have no recollection of it?

A. No, I don't remember it.

Q. But you deny positively that you met both of these plaintiffs at their plant on the Atlantic Avenue address [911] prior to going to the Plantation Restaurant?

A. I deny that positively.

Q. And you deny positively that this order was written on a stationery pad brought along by Mr. Lysfjord and it was written at the Plantation Restaurant rather than at the Flintkote Company's offices, or being delivered to the Flintkote's office?

A. I deny that positively.

The Court: That was rather an involved denial. Were you denying writing it at the Plantation Restaurant, too?

Mr. Ackerson: I will break it down, your Honor.

Q. Do you deny that the order was actually written at the Plantation Restaurant while you were having lunch? A. I deny that.

Q. And you deny the further fact of prior to that going to the Plantation Restaurant and meeting at the Atlantic Avenue address of the aabeta

(Testimony of Robert Eugene Ragland.)

company? A. I deny that.

Q. And you state that the order was brought in about 11:00 o'clock prior to lunch this day by the two plaintiffs, signed, sealed and delivered?

A. Yes, sir.

Q. But the order had no shipping address on it?

A. I believe that is true.

Q. Now let's go to the subject of stationery. As I [912] recall your testimony yesterday——

The Court: Are you going into a new subject, Mr. Ackerson?

Mr. Ackerson: Yes, your Honor.

The Court: It is almost 4:30. I think we might adjourn until tomorrow.

Mr. Ackerson: At 1:30, your Honor?

The Court: Mr. Black had a civic duty to perform today; I have one to perform tomorrow. So we stand adjourned until tomorrow at 2:00 o'clock.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 2:00 o'clock p.m., Wednesday, May 18, 1955.) [913]

May 18, 1955; 2:00 o'Clock P.M.

Mr. Ackerson: Shall we proceed?

The Court: Proceed.

Mr. Ackerson: Will you take the stand again, Mr. Ragland?

ROBERT H. RAGLAND

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Mr. Ackerson: Mr. Black, may we have a stipulation that that is the handwriting of Mr. McAdow, subject to correction?

(Exhibiting document to counsel.)

Mr. Ackerson: I can use this, Mr. Doty. Thank you.

Mr. Doty: Here it is.

Mr. Ackerson: All right.

Cross-Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Ragland, I would like you to—I am going to hand you again Plaintiffs' Exhibit 44 for identification; that is the financial statement from The Flintkote Company's files—and I will just ask you to examine that a moment.

A. (Examining exhibit.)

Mr. Ackerson: May I have this marked Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiffs' Exhibit 49 for [915] identification.

(The document referred to was marked Plaintiffs' Exhibit No. 49 for identification.)

Q. (By Mr. Ackerson): Mr. Ragland, I show you Plaintiffs' Exhibit 49 for identification and

(Testimony of Robert Eugene Ragland.)

call your attention to the second sheet on that. Do you recognize that writing as being that of Mr. McAdow?

A. I wouldn't recognize Mr. McAdow's handwriting.

Mr. Ackerson: We have a stipulation, I believe, to the effect that it is Mr. McAdow's handwriting, do we not, Mr. Doty?

Mr. Doty: We think that it is Mr. McAdow's handwriting.

Mr. Ackerson: And subject to correction we can stipulate that it is?

Mr. Doty: Yes.

Mr. Ackerson: I am going to offer this, if I may, as Plaintiffs' Exhibit 49 in evidence.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 49.)

Mr. Ackerson: I would also like to offer Plaintiffs' 44 for identification in evidence at this time.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 44.) [916]

Q. (By Mr. Ackerson): Mr. Ragland, you will note on the first inside page of Plaintiffs' Exhibit 44, the financial statement, the words "Bob Ragland"? A. Yes.

(Testimony of Robert Eugene Ragland.)

Q. And you testified that you are the only Bob Ragland down there? A. Yes, sir.

Q. You have seen this writing before, whether you can identify the writer or not, haven't you? You have seen that down at The Flintkote Company?

A. Well, I don't know if I have or not.

Mr. Black: I am sorry. I can't hear that.

The Witness: I am not qualified to say whether I have seen it or not. I guess I have.

Q. (By Mr. Ackerson): Does it look to you like the two "Bob Raglands" on 44 and 49 are the same handwriting?

A. There is a similarity, but there is also a dissimilarity.

Q. Would you say that the fact that your name was on this meant that it was to be returned to you or kept by you—I am referring to the financial statement, Exhibit 44? A. No.

Q. Can you think of any other reason that your name [917] would be on there?

A. Other than Mr. Waldron or Mr. Lysfjord wrote it there for me to present to me to be sure it got to me.

Q. Now let me call your attention to page 6 entitled "Schedule Shown Below Represents an Estimated or Projected Policy Which the Company Proposes to Follow During the First Three Months of Operation." Now do you note that the very first two lines on that page read "aabeta company, Los Angeles, California"? A. It does.

(Testimony of Robert Eugene Ragland.)

Q. And was that on there when you saw this document at the time it was presented?

A. I didn't examine it that closely to my knowledge.

Q. But you examined it yesterday and you find no reference whatever to San Bernardino or Riverside, do you? A. No, sir.

Mr. Ackerson: I am going to hand these two exhibits to the jury for comparison of these two "Bob Raglands" on the two exhibits.

(The exhibits referred to were passed to the jury.)

Q. (By Mr. Ackerson): Now, Mr. Ragland, there has been introduced in evidence as Defendants' Exhibit I a purported report—and again purported to have been made by you to Mr. Harkins—that concerns this investigation of the plaintiffs you talked [918] about? A. Yes, sir.

Q. Now you testified on direct examination, I believe, or on cross-examination, that you didn't know whether this card attached to this exhibit, the card of Elmer Lysfjord, where that came from?

A. That is correct.

Q. You did state, however—I will come to that in a moment.

Now you stated something about at about the time the plaintiffs came to The Flintkote Company and were approved as Flintkote dealers—I am talking about the Harkins meeting—that at or about that time you offered to supply the plaintiffs with cuts

(Testimony of Robert Eugene Ragland.)

to be used on the stationery from the Flintkote advertising agency, was it? A. Yes, sir. [919]

Q. And I believe you stated you took them over to the advertising man? A. I did.

Q. And did Mr. Lysfjord on that occasion, whether it was at that time or shortly subsequent thereto, did he get a cut from The Flintkote Company that day and take it with him?

A. I am quite sure he did.

Q. Did he ever get another one?

A. I don't know.

Q. Do you recall whether or not you yourself mailed the smaller cut to him later on?

A. No, sir, I don't recall.

Q. Do you recall whether your advertising man mailed the smaller cut?

A. I don't know if he did or not.

Q. Now, was it at that time that Mr. Lysfjord showed you a rough sketch of what he wanted printed on his stationery? Didn't he show you a sketch that day?

A. He may have, I don't recall if he did or not.

Q. And you don't recall, or do you recall whether or not both the Los Angeles and San Bernardino addresses were on that sketch?

A. If he did show me the literature he proposed printing, I am sure there was no Los Angeles on it. [920]

Q. All right. Let's get on to this Owens Roofing Company job. I want to ask you a question or two more about that.

(Testimony of Robert Eugene Ragland.)

As I recall your testimony, you stated that Mr. Anderson was in there and that after these conversations Lysfjord said he would like to do that job. You, Anderson and Lysfjord went over to the Owens Roofing Company then, did you?

A. Yes, sir.

Q. Was Mr. Waldron there? A. No, sir.

Q. Just the three of you then?

A. Just the three of us.

Q. You went over there and talked to one of the McLanes of the roofing company?

A. I believe that is who we talked to.

Q. You recommended Lysfjord then, I take it. Lysfjord and Waldron to do the job? That was your testimony, wasn't it? A. Yes, sir.

Q. Did Lysfjord take any figures? Did he give any estimate that day as to what the job would cost?

A. I don't know if he did or not.

Q. Well now, I am going to show you Plantiffs' Exhibit 4, and ask you if you have ever seen that stationery on which [921] the Owens job purports to have been figured.

Did you ever see that stationery or stationery similar to that of the aabeta co.?

A. No, sir, I have never seen that.

Q. Well, you have seen a card—you note there is a card there, too?

A. That is similar to the one attached there.

Q. That is identical, is it not? Will you examine the two?

Mr. Ackerson: They are identical, except for the

(Testimony of Robert Eugene Ragland.)

long-hand pencil marks on there, which we can say is not part of the exhibit, Mr. Black?

Mr. Black: Oh, yes.

The Witness: That is right.

Q. (By Mr. Ackerson): They are identical, aren't they? A. Yes, sir.

Q. You note they list both San Bernardino and Los Angeles telephone numbers?

A. Yes, sir.

Q. You have never seen that stationery before?

A. No, sir, I have never seen that.

Q. Did you ever see any other different type of stationery of the aabeta co., a calling card of Lysfjord that was different than this, a business card? A. No, sir. [922]

Q. That is the only one you ever saw?

A. Yes, sir.

Q. Now, you do note on this stationery that it reads "aabeta co., Acoustical Tile Contractors," and it bears the same little seal as the calling card?

A. Yes.

Q. Except it isn't in two colors, is it?

A. That is correct.

Q. Then you note it reads, "901 Waterman Avenue, San Bernardino, California," with a San Bernardino telephone number.

"7302 South Atlantic Avenue, Los Angeles 4, California LOgan 0800"? A. Yes, sir.

Q. That LOgan 0800 was the telephone number you called, wasn't it, when you went out and you

(Testimony of Robert Eugene Ragland.)

say you went out to investigate these so-called rumors? A. Yes, sir.

Q. Did Mr. Harkins give you that number or did you just call the telephone company?

A. No, that number was given to me.

Q. By whom? A. I don't recall.

Q. Are you positive you didn't have the card attached to that in your pocket at that time and get it from that card? [923]

A. I have never had one of their cards.

Q. Mr. Lysfjord or Mr. Waldron never did give you any of these calling cards for the purpose of directing customers to them, or otherwise?

A. No, sir.

Q. Well, anyway, to complete that story, you did not call them up and make an appointment with them at this Atlantic Avenue address?

A. Yes, sir, I did.

Q. You got out there and you told them you were investigating these rumors? A. I did.

Q. Then, I believe you stated you spent about a week running everything down over in the Valley and Downer——

A. Yes, sir, I spent the better part of that week.

Q. Your testimony, I believe, says a week, but we won't quarrel about that.

Now, you recall testifying in a deposition, sworn testimony in my office, on October 23, 1954?

A. Yes, sir, I recall.

Q. I am going to read you, beginning with the

(Testimony of Robert Eugene Ragland.)

last line on page 32, where I asked you this question:

"Q. Well, now, you have stated that you told us about these rumors that the plaintiffs were engaging in business in the Los Angeles area. [924] What happened then, why were you told that by Mr. Harkins?

"A. He wanted to know if they were true and he told me very definitely to get out and cover the ground, if they were doing business at the Van Nuys Hospital go out and see if they actually do have a contract and if they have got a market over in Hawthorne or Torrance, go out and see if they have got it.

"Q. Did you do that?

"A. Go out and see if they have an office in Bell, which I did.

"Q. Did he tell you where the office was?

"A. No, sir.

"Q. How did you find it?

"A. Knocking on doors. They told me it was a general location around Torrance and Atlantic—around Florence and Atlantic.

"Q. That was after they were actually performing contracts and getting them here?

"A. They had three specific contracts, as I recall.

"Q. It was after they had received the first shipment of acoustical tile; is that right?

"A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

"Q. Prior to that time you had never been in the Bell plant? [925]

"A. No, sir."

Do you recall giving that testimony?

A. I recall it. [926]

Q. Do you recall now having knocked on doors to find it or did you telephone?

A. I telephoned.

Q. Now in that same deposition, Mr. Ragland, you stated as follows, beginning on line 25, page 36, with respect to the Owens Roofing job:

"Q. Now, did you ever hear of the Owens Roofing Company job at 726 Mateo Street, in Los Angeles?

"A. Yes, sir.

"Q. Did you call that job to the plaintiffs' attention?

"A. That was called to their attention in our office quite by accident.

"Q. Were they told to get the job?

"A. No, sir, not directly.

"Q. Did you tell them to go get the job?

"A. No, sir.

"Q. Did you know that they did perform the job?

"A. I was aware of that fact, yes, sir.

"Q. Were you aware they got the contract before they performed it?

"A. No, sir. That was to be a material only sale, Owens Roofing Company were to do that [927] job themselves.

(Testimony of Robert Eugene Ragland.)

"Q. But you did not refer it to these plaintiffs?

"A. I was probably instrumental in their knowing about the job, yes, sir."

Then again we get off to another subject, but on line 12, page 38:

"Q. You spoke a moment ago about this one contract they got, the last one I mentioned, the Owens Roofing Company job.

"A. Yes.

"Q. You stated that it was supposed to have been a material sales?

"A. Yes, sir.

"Q. What did you mean by that?

"A. Well, Owens Roofing Company, as I understand it, is a roofing account of ours or handled Flintkote materials and are serviced by our salesman Andy Anderson, and they told Andy they'd like to have an acoustical ceiling in their offices, 'you make acoustical tile, we will put it in ourselves,' so Andy came in that particular time and we had right outside of Mr. Thompson's office a big community desk. The sales personnel there, the outside salesmen, being not in the office constantly [928] they share this one big desk, and I happened to be sitting there with Lysfjord at the time that Andy came in and told that story.

"Q. Did Mr. Lysfjord hear Anderson request——

"A. I am sure he did.

"Q. ——Owens' request to buy this tile from Flintkote?

(Testimony of Robert Eugene Ragland.)

"A. I'm sure he did.

"Q. Well, what did he tell him, what happened?

"A. Baymiller was in on it and suggested calling Dick Howard, which was done. I didn't do it personally.

"Q. Did you hear it done? Did you hear Thompson or Baymiller do it?

"A. No, sir, I didn't.

"Q. All right. In any event, they were going to apply it themselves, the Owens Company, that is your understanding and statement?

"A. Yes, sir.

"Q. When did you first find out that Lysfjord and Waldron applied it and sold it?

"A. Lysfjord asked about that job. He said, 'We are not quite set up yet to do business but we would like it. I think I'll go down there.' [929]

"Q. What did you tell him?

"A. I don't recall what I did tell him.

"Q. Didn't you tell him, 'You cannot do that; that is Los Angeles'?

"A. No, sir, I didn't."

Do you recall that conversation?

A. Yes, sir, I recall it.

Q. Did you have in mind at that time that you personally took Lysfjord down there and recommended him for the job or did that occur to you just yesterday?

A. No, sir, I recall that very definitely. The three of us were down there.

(Testimony of Robert Eugene Ragland.)

Q. That was your testimony at that time in September?

A. Yes, sir. I see no contradiction in that.

The Court: The question is, is that your testimony.

The Witness: Yes, sir.

The Court: The jury will have to determine whether there is any contradiction.

Q. (By Mr. Ackerson): Now I showed you the other day a plaintiffs' exhibit for identification, Mr. Ragland, or was that a letter from the Owens Roofing Company, dated in 1954. Do you recall that?

A. Yes, sir.

Q. And you said you had seen that letter? [930]

A. Yes, sir, I had.

Q. Now after this deposition and after you had so testified on this Owens Roofing job, did you go down to see the McLanes? A. No.

Q. You did not? A. No, sir.

Q. How did you happen to see the letter?

A. Mr. Anderson brought a copy into the office and showed it to us.

Q. How did he happen to do that?

A. I certainly don't know the circumstances under which he happened to get the letter, but I believe Mr. McLane offered it to him.

Q. But in this testimony in your deposition you did not mean to say, did you, that you did recommend the aabeta company for that job?

A. I recommended that they do the labor on it, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. But you did not mean to represent at that time, the deposition time, that you took them down there and assisted them in getting the job, did you? A. I certainly was instrumental.

Q. Now you testified yesterday also that you had a conversation with Lysfjord and that you recommended Phoenix [931] and Lysfjord said something that he would take a trip down there and he came back later and told you he had taken the trip?

A. Yes, sir.

Q. But he didn't care much about it?

Now do you recall being questioned on that point in this same deposition, Mr. Ragland?

A. I don't recall that.

Q. Well, we were talking about these conferences between you and Mr. Lysfjord.

This is beginning on page 5, line 21, Mr. Black.

"Q. When did you first contact either Mr. Lysfjord or Mr. Waldron with respect to their obtaining a supply of Flintkote acoustical tile?

"A. I believe they contacted me, possibly. I can't be too exact on that. Say June of 1951."

That was at the time you became promotional chief of acoustical tile, is that right?

A. That is correct.

Q. Continuing:

"Q. At least your recollection tells you that it was some months after you became an acoustical representative; is that right?

"A. That's right."

(Testimony of Robert Eugene Ragland.)

As a matter of correction, it was about the [932] time?

A. We used the word "approximately" in there.

Q. All right.

"Q. What was the nature of that contact; can you just relate what happened?

"A. More on a friendship basis. 'We know that you're with Flintkote; they make a good acoustical tile; how about it, can we have some of it? I think we'd like to get into the business and who do we see, how do we go about seeing the right people?'

"Q. Did you tell them?

"A. At that time I told them that we had adequate representation locally; 'why don't you go over to Phoenix, boy? I need somebody badly in Phoenix, or in, say, Albuquerque or possibly Denver, some place else?' "

Now is that the only time that you had a private conversation between just the two of you about this Phoenix proposition?

A. Between just the two of us? [933]

Q. Yes. A. I don't recall.

Q. You don't recall any others?

A. No, sir.

Q. Then I go on with the next question:

"Q. Well, what did they say to that?

"A. Well, it was sort of a neutral acceptance. I mean, there's neither yes or no, more or less, "We'd like to stay. We're in the market. We don't want to go to Phoenix.' "

(Testimony of Robert Eugene Ragland.)

Do you recall that as Lysfjord's reply?

A. That is the general nature of his statement.

Q. And that was your testimony in October of last year? A. Yes, sir.

Q. Now, you have testified to this first Supper Club meeting, and you will recall your testimony on that, I am sure, from yesterday afternoon.

"Well, did you talk with Mr. Baymiller about it before Mr. Lysfjord——"

Mr. Black: May I have the page, please?

Mr. Ackerson: Yes. It is 11, line 3. Pardon me, Mr. Black.

"Q. Well, did you talk with Mr. Baymiller about it before Mr. Lysfjord arrived on the scene?

"A. Surely. [934]

"Q. What did you tell him?

"A. I explained their background on a friendship basis with Lysfjord and Waldron; I expressed my confidence in their ability and thought that it would be worth his time and Flintkote's time to give them the consideration of an appointment that they wished at that time."

Then you go on and state—or——

"Q. In other words, you recommended them as contractors?

"A. Yes.

"Q. Where did you have this lunch?

"A. The Manhattan Supper Club on—I don't recall. It's 37th——"

And the three of you attended. That last sentence was not quoted. A. Surely.

(Testimony of Robert Eugene Ragland.)

Q. That was the first meeting then, was it not?

A. Yes, sir.

Q. Well, then I asked you a question at the last line on page 11. I asked you what transpired and I asked you—you stated the general terms of discussion, and then I asked you this question:

"Q. Well, what, if anything, did Mr. Lysfjord have to say on that occasion? [935]

"A. I am quite sure Mr. Baymiller stated that we were adequately represented in the Los Angeles metropolitan area and that possibly if they would consider opening an office, say, in San Bernardino or Riverside Counties, we might be able to induce our management to go along with a setup like that.

"Q. Well, now, to refresh your recollection, isn't it a fact Mr. Baymiller told Lysfjord at that time that if he would also take San Bernardino where you were not represented that it would help him to get the line of tile here; isn't that the actual statement of Baymiller?

"A. I don't recall."

Do you recall giving that testimony?

A. Yes, sir.

Mr. Black: The entire answer wasn't quite read. It changes the accent quite a bit.

Mr. Ackerson: I kept on asking questions and he finally remembered, but he didn't remember at first. You can bring in the first——

Mr. Black: The answer was not completely read. "I don't recall that," he said.

Mr. Ackerson: I beg your pardon.

(Testimony of Robert Eugene Ragland.)

Mr. Black: It changes the accent quite a bit.

Mr. Ackerson: "I don't recall that." Thank you, Mr. [936] Black. I didn't mean to leave out a word.

Q. (By Mr. Ackerson): Now, you likewise testified regarding the Harkins meeting.

As I recall your cross-examination and possibly the direct the previous two days, you said these two people came down here, Thompson, Baymiller came out and greeted them, and the two of us either—was it you and Baymiller, you say, that took them in to meet Harkins, both of you?

A. I believe it was Mr. Thompson and I.

Q. The two of you went in there. I wanted to be fair. I reread your testimony and I can't find where you definitely answered whether or not one or both of you. That is, either you or Thompson remained in there during the time, entire time that Mr. Lysfjord and Mr. Waldron were in Harkins' office?

A. Well, that point isn't clear in my mind, either. I could have and I couldn't have; I don't recall.

Q. But then you testified that after you came out of Harkins' office—and correct me if I am wrong—then you took these people over to McAdow? A. Yes, sir.

Q. And gave them the statement?

A. Yes, sir.

Q. Do you think that is the way it happened?

A. I am quite sure that is the way it happened.

(Testimony of Robert Eugene Ragland.)

Q. Was your memory any clearer yesterday than it was [937] when you had this deposition taken? A. Not a bit, sir.

Q. Well, I believe in this deposition you had it more or less reversed, and I would like to read it to you and see if it refreshes your recollection.

And I think you also stated that they were not told that they were Flintkote dealers, or they were not authorized until after they had talked to Mr. Harkins. Is that your testimony? Am I incorrect on that?

A. Was that my testimony yesterday?

Q. That is my recollection of it, Mr. Ragland. I could be wrong.

A. Well, I could also be wrong. I think we had every expectation to believe they were before, but actually Mr. Harkins had the final word.

Q. Yes. Then actually you don't know whether when Thompson came out and greeted them and congratulated them as dealers, or you don't recall whether you did?

A. No, sir, I don't think Mr. Thompson or myself ever have used that statement.

Q. But you could have?

A. We could have, yes.

Q. You were certain they were going to be dealers because you were taking them in to make it official with Harkins. [938]

A. As I said, we had every expectation.

Q. There is one other little thing here that may refresh your recollection a little.

(Testimony of Robert Eugene Ragland.)

This is with respect to your going in the office of Mr. Harkins.

"Q. Very well. We have got through the introduction to Mr. McAdow."

As I stated, in your previous deposition you stated you introduced them to McAdow first, rather than afterwards. But let's not quarrel about that. It could have been either, couldn't it?

A. It was after.

Q. Well, you were wrong in your deposition then, is that——

A. I can't ask questions, I can just answer them.

The Court: If you don't understand a question you can ask to have it clarified so you are answering something you understand. You can't argue or ask him about things that might modify a situation.

Q. (By Mr. Ackerson): Let me read your testimony in that regard and you can change it now if you want to.

"Q. All right. Now tell us about that."

I am asking about the meeting, when they came to see Harkins.

"A. They came in and had their financial statement and [939] Mr. Thompson and Mr. Baymiller and myself met them, and we exchanged greetings. The secretary said that Mr. Harkins was free, would we please go in and we——

"Q. Right there, was it arranged that Mr. Lysfjord and Mr. Waldron would get this line of Flintkote acoustical tile before you went in to Harkins'?

"A. Yes, sir. I believe that was the general con-

(Testimony of Robert Eugene Ragland.)

sensus of opinion.

"Q. In other words, these two plaintiffs met you, Mr. Thompson and Mr. Baymiller and one of the three of you told them they were in; is that right? A. Yes, that's right."

And then you repeat.

"Q. Then, as you recall it, you took them out and introduced them to another gentleman, your accountant?

"A. Yes, sir. Mr. McAdow. He's our credit department manager.

"Q. What did you state to Mr. McAdow in connection with this introduction?

"A. I stated they were good friends of mine; we were going to set them up as acoustical applicators [940] handling our material in San Bernardino."

And then I said——

Mr. Ackerson: This is line 20, page 22, Mr. Black:

Q. (By Mr. Ackerson): "Q. Very well. We have got through the introduction to Mr. McAdow. Then, what happened?

"A. Mr. Harkins shook hands, I recall, and pleasantries were expressed and I think we took them over to our advertising and sample department and showed them what was available to them. I don't recall exactly if they had an order ready to place that day or not.

"Q. Were you there during the entire period that these two gentlemen, the plaintiffs, were in the presence of Mr. Harkins?

(Testimony of Robert Eugene Ragland.)

"A. No, sir, I believe I took either one of them over to McAdow while the Harkins conversation was still going on.

"Q. In other words, they were talking to Mr. Harkins when you were not present on this occasion; is that right?

"A. That could very easily be.

"Q. Is that your recollection?

"A. That's my recollection."

Can you state now, after hearing your prior testimony, [941] whether or not you do recall that you did leave the office after introducing them to Mr. Harkins?

A. I don't think I want to change anything I have said. I will let that stand. [942]

Q. In other words, you still say you just don't know, is that the ultimate effect of it?

A. Yes, sir.

Q. Now I asked you whether or not you felt you were in Harkins' office during the entire period, whether or not you heard Mr. Harkins refer to a Ryan Aircraft job, and your answer was no.

A. That is right.

Q. Now I have refreshed my recollection since last night. Instead of the Ryan Aircraft job I meant to say the Convair Aircraft job over at Pomona. You have heard of that job, have you not?

A. Convair Aircraft, yes, sir.

Q. And you do know that Flintkote sold a tremendous amount, or that a large amount of Flint-

(Testimony of Robert Eugene Ragland.)

kote roofing was used on that job? You know that, don't you?

A. I know it by hearsay, yes.

Q. It was an extremely large order?

A. Yes, sir.

Q. But you stated that you did not hear Mr. Harkins mention this order to the plaintiffs?

A. That is correct.

Q. And you did not hear Mr. Harkins suggest that there was acoustical tile in the job, that they could go after that? A. No, sir. [943]

Q. Then your answer of "No," no knowledge of this Ryan job, was that what you meant or did you say you had no knowledge—in other words, it was based on my misuse of the term, is that right?

A. I know Ryan Aircraft is in San Diego.

Q. But you do know of this Convair job, though?

A. Yes.

Q. Now you stated, I believe, that when you came back from this Seattle-San Francisco trip that Mr. Harkins, was it, called you in and said that there are rumors that these people are doing business here?

A. The first man I met was Mr. Baymiller.

Q. And he told you that?

A. He gave me that, in essence, yes, sir.

Q. And then did you go from Mr. Baymiller to Mr. Harkins' office that day?

A. No, sir, Mr. Lewis saw me after Mr. Baymiller and he reiterated approximately what Mr. Baymiller had told me.

(Testimony of Robert Eugene Ragland.)

Q. Well, now, Mr. Baymiller, did he say from whence these rumors came?

A. I don't recall.

Q. Didn't he actually tell you that Krause, Hoppe, Newport, said that?

A. He possibly did tell me that.

Q. And did Mr. Thompson tell you the same thing practically [944] as to where they came from?

A. No, sir, I didn't talk to Mr. Thompson that morning.

Q. Did you talk with Mr. Harkins before you went out on this alleged investigation?

A. Yes, sir.

Q. Was that the same day?

A. Yes, it was.

Q. And did Mr. Harkins tell you about Hoppe, Krause, and Newport reporting this?

A. I don't recall him using any names.

Q. By the way, Mr. Ragland, you do know that Mr. Newport and Mr. Harkins had some personal social relationship aside from a business relationship, didn't you?

A. No, I have no personal knowledge of that. Just hearsay.

Q. But you understand that?

A. That was my understanding, yes, sir.

Q. Were they neighbors?

A. I guess they both lived in San Gabriel at one time.

Q. Well, now, when you got through talking with Mr. Harkins, did you immediately go out to this

(Testimony of Robert Eugene Ragland.)

Atlantic Avenue address, phone for an appointment and immediately go out there the same day?

A. It seems to me like I did. I arrived at the Bell office before noon. [945]

Q. That was your first round on this investigation, wasn't it?

A. I am quite sure it was, yes, sir.

Q. Then you asked them about these jobs? You said there were three jobs that you were interested in? A. Yes, sir.

Q. Did you ask them about it?

A. Yes, sir.

Q. Did they tell you yes, they had them?

A. Yes, they told me they had them.

Q. And did you ask them the rest of these questions that are contained in this report of yours? I mean about a credit question from Simpson Company, and so forth, did you ask them about that?

A. Credit from the Stanton Company.

Q. Stanton. I beg your pardon. Did you ask them about that. A. I believe I did.

Q. And they explained it to you, didn't they, that it was a mistake, that it was an error on the part of the bank or authorization of Yeoman's to sign a check, or something like that?

A. I believe in essence that is one of the things. I don't know if that was clarified right at that time or shortly thereafter. [946]

Q. Well, now, there was another item in this report. You said something there that Mr. Lysfjord or Mr. Waldron had been accused apparently, at

(Testimony of Robert Eugene Ragland.)

least that was one of the rumors you purported to investigate and report on, that they had been accused by someone about stealing papers from the Downer Company files, and I believe they were referring to the take-off cards. Do you recall asking anything about that from Lysfjord or Waldron on that day?

A. I believe I did.

Q. Now where did that rumor come from, the same sources?

A. Just one of the many, the same source.

Q. There were many sources?

A. The same general source.

Q. And you found that that wasn't so, too, didn't you?

A. I asked them if they had taken files with them, job files, and naturally they said no.

Q. And you as a former salesman knew that these unsuccessful take-off sheets were not filed with the company or kept for posterity in any event, they were really the salesman's property to do with as he wished after the job was lost? You knew that as a salesman, didn't you?

A. It never has been the policy of anyone I ever worked for.

Q. You mean it wasn't the policy with the Shugart [947] Company? A. No, sir.

Q. How long did you sell for Shugart?

A. Close to three years.

Q. And you bid 15 times on a public job?

A. Yes, sir.

Q. Or about that? A. About that.

(Testimony of Robert Eugene Ragland.)

Q. And did Shugart make you always come back with the unsuccessful bid or take-off sheet?

A. Every record I ever had was their property.

Q. But you determined at least and reported to Harkins that that wasn't so, that these people did not steal anything in retaining these take-off cards, didn't you?

A. They told me they hadn't so I accepted that.

Q. Now there is another reference to something in there that I don't quite understand, and I would like you to tell me what you know about it because it may come up in this case.

It is No. 4, the fourth piece of information or answer you purport to give to Mr. Harkins, "that the aabeta company has not sold to Louis Downer Company of Riverside any Flintkote tile to be installed in the Orange Coast College job."

Now Louis Downer was not a Flintkote dealer, was he? A. No, sir. [948]

Q. You recall that Lou Downer tried to get Flintkote tile up in San Bernardino and was informed by your company to get it from aabeta co.? Do you have any knowledge of that?

There is an exhibit in evidence here to that effect. I won't find it if——

A. I imagine that is true, yes.

Q. Yes. Now, where was this Orange Coast job?

A. The Orange Coast College is in Costa Mesa, just in back of Balboa.

Q. How did that come to your attention? Why

(Testimony of Robert Eugene Ragland.)

were you interested in that? What did Mr. Harkins want you to find out about that for?

A. It was one of the many rumors that were going around, that it seems like the Louis Downer Company had bid on a job with which he had no material to meet the specifications.

Q. But you had told, at least, your company had told Waldron and Lysfjord they could sell Louie Downer tile. Invited Louie Downer to buy it from them. So I still don't understand why Mr. Harkins was interested in that Orange Coast job.

A. I don't, either.

Q. Wasn't it because the same contractors had objected to him competing in this area, too?

A. To Louis Downer?

Q. Yes. Isn't that what you were told? [949]

A. I am not sure of the date, but I believe he was connected with his father's company in Los Angeles at that time.

Q. But that is the only—you can't give me any explanation as to why you should be asked about that?

A. There was a rumor that aabeta was selling Louis Downer material for work in Los Angeles.

Q. And that was objected to, was it?

A. It seems like it was, yes, sir.

Q. But you don't know who objected to it, unless it was these same people?

A. Not specifically. Just aggregately, it was the same objection.

Q. The contractors objected to it? That is right?

(Testimony of Robert Eugene Ragland.)

A. Surely.

Q. Do you recall, Mr. Ragland, that after this, or along about the same time, you had arranged to sell a lumber company in Bakersfield, tile for that job, too?

A. No, sir, I don't recall any lumber company at Bakersfield. I recall a Forest Lumber Company in Lancaster.

Q. The McNaul Company in Bakersfield. Do you remember you made arrangements to sell them tile for this same Orange Coast job?

A. No, sir.

Q. And do you remember that that order was stopped, [950] too.

A. I don't recall it.

Q. They refused to deliver that order that was in your line at that time, then you would know that a substantial order of tile was stopped, wouldn't you? A. Yes.

Q. Don't you recall that order was stopped because it was going on the Orange Coast school job?

A. Had Flintkote accepted it? I don't know.

Q. You know it was never delivered by Flintkote after talking about it or selling it?

A. I would have to check their records, to find out about that.

Q. You have no recollection on that.

A. No.

Q. I want to ask you one more question on this report. I would like you to think about it, Mr. Ragland.

(Testimony of Robert Eugene Ragland.)

You have this report dated February 15, 1952?

A. Yes, sir.

Q. Was that the actual date you had it typed up?

A. I am sure it is. I certainly haven't made two reports.

Q. Would you state, as a witness, that it wasn't typed up after July 2, 1952—after July 21, 1952?

A. I will state yes, sir. [951]

Q. In other words, you say it was before that?

A. I will state that it is the same date that is on the paper.

Q. Well, you stated you went down after talking with Mr. Harkins about these rumors, that you went down to these two plaintiffs at the aabeta plant on Atlantic Boulevard in Bell, and you had your conversations with them and you asked them about these prices.

Then what did you do? You went back to the—did you go back and report orally to——

A. No, sir, I don't believe I did go back and report orally to Mr. Harkins any time that week. I went on to the next order of business; as to my way of thinking I checked the North Juanita Street rumor, that they had an office next to the C. F. Bolster Company.

Q. You made all these checks you mentioned yesterday, is that it, after you left this office?

A. Yes, sir.

Q. Now, I am going to call your attention to your testimony in this deposition of October, 1954. We will start at page 43, line 13. I ask you:

(Testimony of Robert Eugene Ragland.)

"Q. Now, I do not want to interrupt you but let's get it in a chronological order—get it in chronological order."

Mr. Ackerson: Mr. Black, I am not a very good reader. [952] You correct me if I leave out any word or change a word it isn't intentional.

Mr. Black: If it is unimportant, I won't.

Mr. Ackerson: I do once in a while, even though I try not to. I continue:

"Q. Now, I do not want to interrupt you but let's get it in chronological order. You say you ran down these leads. Did you go out and see them at their Bell plant? A. Yes, sir.

"Q. That was before the three of you went out, I take it?"

And you understand I am referring to the termination meeting them?

A. I think I did, yes, sir.

Q. And you answered "Yes, sir."

And then I asked:

"Q. Who did you see at the Bell plant?

"A. I saw Mr. Lysfjord first and I believe Mr. Yeomans was there, if I'm not mistaken.

"Q. What did you tell them? What occurred on that occasion?

"A. Well, I expressed my amazement that the place was there, frankly.

"Q. Did you tell them that you were amazed they [953] had a plant out there?

"A. I did, I told them they had to my knowledge

(Testimony of Robert Eugene Ragland.)

—what I had heard, they had been taking jobs in Los Angeles, and we didn't agree to that.

"Q. Did you tell them to stop it?

"A. No, sir, I don't believe I told them to go ahead or back up or anything. I told them it wasn't the right thing to do and they understood that and they stated—I believe Mr. Waldron came in about that time, possibly after I had been there a half hour, 35 minutes, he came by and I told them that I had to go out and run down the other rumors that I had heard and that it was not right. Mr. Lysfjord said, "Well, do you think if we go out back to San Bernardino everything will be all right?'

"I said, I didn't know.

"Q. You said you had to run down other rumors. Didn't you just ask them if they had taken any other jobs or what jobs they had taken here?

"A. Possibly I did ask them if they had the contract on the Valley Community Hospital in Van Nuys.

"Q. You asked them whether they did?

"A. Yes.

"Q. What did they say?

"A. He said they had. [954]

"Q. Did you go down the other contracts and make inquiry?

"A. Three of them, yes, sir, that I had rumors of.

"Q. Well, then, you made your investigation, if you made it, at the plant there, didn't you?

"A. Yes, sir.

"Q. I take it, then, you went back to Flintkote,

(Testimony of Robert Eugene Ragland.)

didn't you? A. Yes, sir.

"Q. What did you do when you got back there?"

And then your answer:

"A. Mr. Thompson, Mr. Baymiller were called, along with me, into Mr. Harkins' office and I reiterated the facts as I had found them and Mr. Harkins said that they have broken a gentlemen's agreement with us; that Mr. Thompson and Mr. Baymiller should go out and tell them that we are terminating our agreement with them."

Do you recall that testimony?

A. Yes, sir.

Q. Does that refresh your recollection as to whether you are now correct, or it is now your opinion you did anything more than go out and talk to these gentlemen and come and terminate? [955]

A. That, in essence, is correct. I don't want to change any of my testimony. You have lumped together a time element there that spans over a [956] week.

Q. Well, I didn't lump it, I just read the testimony. You say that is correct. You did give the testimony? A. I gave that testimony, yes, sir.

Q. Now when Mr. Harkins first called you into the office about these so-called rumors, Mr. Ragland, you had been up in Seattle, you stated?

A. That is correct.

Q. And I take it by that that he must have waited until you got back to have you make this investigation? A. Yes, sir.

Q. Did he ever explain or state to you why he didn't just pick up the telephone and ask these gen-

(Testimony of Robert Eugene Ragland.)

tlemen themselves? They didn't deny anything when you got out there. Why didn't he do that as the big boss of the 11 Western states?

A. I don't know.

Q. Didn't he ever tell you?

A. He never did tell me.

Q. When you were sent out there you and Baymiller and Thompson, you say Mr. Harkins said they violated the gentleman's agreement, go out and terminate them, was there anything said about why he just didn't sit down and write a letter and say, we won't sell you for such-and-such a reason? I mean was there any explanation of why he sent all three of you clear out to Bell, or over to Bell?

A. There is possibly an explanation why he sent me [957] first because I was dealing with the plaintiffs.

Q. But did he give you any explanation as to why he wanted all three of you to go out there and deliver this Message to Garcia?

A. Well, I imagine for——

Q. Did he say anything?

A. He didn't tell me why.

Q. No explanation whatever?

A. Not to me.

Q. Now Mr. Thompson wasn't even an acoustical tile man down there, was he? Mr. Thompson's field was the roofing field, wasn't it?

A. He also has acoustical tile in his department.

Q. Does he? A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. At that time did he? A. Yes, sir.

Q. But he is basically in the roofing field, isn't he? You were basically an acoustical tile man.

A. I worked for Mr. Thompson and whatever I sold was credited to his department.

Q. Now, Mr. Ragland, up to this time, that is, up to the time of the termination on February 19—we have about decided that is the date—of 1952, I think you stated your three Flintkote outlets here in Los Angeles County at that time [958] was Sound Control, Howard and Coast, wasn't it?

A. That is correct.

Q. Was there any limitations whatever on their activity, that is, geographically?

A. None that I know of outside of normal competitive limitations.

Q. They could and did establish jobs in Riverside or San Bernardino if they wanted to, couldn't they? A. Yes, sir, they did.

Q. And I believe they did at times?

A. Yes, sir.

Q. And they could go up to Santa Barbara or they could go down to Long Beach or they could go to Pomona? A. Yes, sir.

Q. They could do this Convair job or any other job they wanted to, couldn't they?

A. Yes, sir.

Q. There was no limitation whatever?

A. That is right.

Q. And did you answer that prior puestion of

(Testimony of Robert Eugene Ragland.)

mine as to how this letter from the Owens Roofing came to your attention after your deposition?

A. Mr. Anderson showed it to me in the Flintkote office.

Q. And yet you can't tell me how Mr. Anderson got it, or why he got it? [959]

A. No, sir, I don't know how he got it.

Q. Isn't it true that after your deposition The Flintkote Company investigated to see what McLane was going to say about it, isn't that the reason you got the letter, when you went down to ask him, didn't he say, well, I have already written a letter?

A. No, sir.

Q. Did you go down yourself?

A. The only time I have been in the Owens Roofing Company offices was when I took Mr. Lysfjord in there.

Q. Do you know whether or not Anderson was sent down there to get that letter and talk to the McLanes to see what they would say about your contacts in connection with that job?

A. No, sir, I don't have any knowledge that he was sent down there.

Q. But in any event Anderson came back and showed you the letter they had written to the aabeta company about your contacts about that job?

A. Yes, sir, he showed it to me.

Mr. Ackerson: I believe that is all, Mr. Black.

Mr. Black: I have no redirect examination. Does the court wish to call the next witness or shall we take a recess?

The Court: We will take a recess before we go on with the next witness.

(Short recess.) [960]

Mr. Black: We shall call Mr. Baymiller, if the court please.

BROWNING BAYMILLER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: You full name, sir?

The Witness: Browning Baymiller.

The Clerk: Will you spell the last name?

The Witness: B-a-y-m-i-l-l-e-r. That is one word.

Direct Examination

By Mr. Black:

Q. Your present occupation, Mr. Baymiller?

A. I am assistant sales manager of the Southwest Division of the Pioneer Division of The Flintkote Company.

Q. How long have you held that position?

A. Since about May of 1950.

Q. Have you held it continuously from that time to the present? A. Yes, sir.

Q. What, in general, do your duties consist of in that capacity?

A. My duties consist of directional and guidance of our group of outside salesmen that are stationed

(Testimony of Browning Baymiller.)

at strategic points throughout the territory that we serve. [961]

Q. What commodities made by your company are dealt with by you in that department?

A. All building materials that we handle with the exception of floor tile. By all of the building materials I mean acoustical tile, fiberboard tile, roofing, asphalt and various types of coatings.

Q. Who is your immediate superior in that position? A. Mr. E. F. Thompson.

Q. Was he your superior in the summer of '51 through the spring of '52?

A. Yes, sir.

Q. When and how did you first learn of Messrs. Lysfjord and Waldron?

A. My first knowledge of Mr. Lysfjord was, I would say, in the early or middle '51 when he was mentioned to me at sundry times by our promotional salesman, Mr. Ragland.

Q. What in general was told to you about him or them?

A. That he had been associated with Mr. Ragland, being employed by the same company at a previous date, and they both had left that company and Mr. Lysfjord was now working for another firm of the same nature, and that he was interested in leaving that firm and going into the acoustical tile application business.

Q. What, if anything, did you say to Mr. Ragland in response to this information? [962]

(Testimony of Browning Baymiller.)

A. I informed Mr. Ragland that at that particular time we had no opening.

Mr. Ackerson: Just a moment. I am going to object to this as hearsay, your Honor.

The Court: It is difficult for me to determine whether it is hearsay. This man is testifying to a conversation he had with one of the plaintiffs.

Mr. Ackerson: Yes.

The Court: What makes that hearsay?

Mr. Ackerson: There is certainly no way to rebut it.

The Court: If it did not occur, your client could come up here and tell us so.

Whatever it might be, it isn't hearsay. The objection is overruled. [963]

Q. (By Mr. Black): Did Mr. Ragland continue to approach you with respect to possible opening for the plaintiffs in your department?

A. Yes, Mr. Ragland at various times requested a hearing with Mr. Lysfjord, with me.

The Court: I might have misunderstood. I thought he was talking about one of the plaintiffs.

Mr. Ackerson: No, your Honor. This is a conversation between two of the defendants—or, I mean two of the employees of Flintkote Company. I don't know, they may have talked about anything. I think it is all hearsay.

The Court: I misunderstood——

Mr. Black: It is all preliminary.

The Court: I misunderstood. It is hearsay.

Mr. Ackerson: I thought your Honor did.

(Testimony of Browning Baymiller.)

Mr. Black: It is a statement of what the witness did in the course of his business in connection with initial contact. It is not offered to prove the truth or falsity of the statements made, as respects to third parties. It is simply a recital of what he did in pursuance of his duties.

The Court: To show this witness' actions?

Mr. Black: It is merely preliminary. We are leading up to the first conversation.

The Court: All right. Go ahead.

Q. (By Mr. Black): Did Mr. Ragland continue to attempt [964] to interest you in the desire of the plaintiffs to go into business for themselves, in connection with Flintkote products? A. Yes, sir.

Q. What developed from those continued approaches?

A. As a courtesy to the plaintiffs and to Mr. Ragland, who was a promotional man, I conceded to give Mr. Lysfjord a hearing, and see what he had to offer.

Q. And did you have such a hearing?

A. Yes, sir.

Q. When did that take place?

A. I would say sometime in the early fall of 1951.

Q. And where?

A. Manhattan Supper Club on South Western Avenue.

Q. Who was present at that time?

A. Mr. Lysfjord, Mr. Ragland and myself.

Q. Nobody else? A. No one else.

(Testimony of Browning Baymiller.)

Q. As nearly as you can recall, would you state the substance of the discussion had at that meeting?

A. The discussion was mostly, the substance of it was Mr. Lysfjord's attempts to impress upon us what a valuable asset he would be as an outlet for our acoustical tile.

Mr. Ackerson: May we have what was said, Mr. Black?

Mr. Black: Yes. I am leading to that.

Q. (By Mr. Black): State, as nearly as you can, what [965] Mr. Lysfjord said in that connection.

A. Well, it was my first meeting of Mr. Lysfjord and he expressed the desire to better himself which is something we all do. By bettering himself he anticipated——

Mr. Ackerson: I guess——

Q. (By Mr. Black): The substance of what he said. Is this the substance of what he said?

The Witness: That is right.

Mr. Ackerson: You are stating what Mr. Lysfjord said, Mr. Baymiller?

The Witness: Right.

Q. (By Mr. Black): So I understand——

The Court: Tell us what he said, instead of trying to interpret what he said. That is, don't say "He anticipated."

The Witness: Your Honor, I am unable to recall the exact words, if you will pardon it, but I will have to give the substance of it.

The Court: We don't expect you to be a miracle

(Testimony of Browning Baymiller.)

man and recall exactly. You can tell us the substance of what he said. Keep it in terms, or the substance of the terms of the conversations, instead of interpretations or conclusions, or what was meant by the conversations.

The Witness: Mr. Lysjford's statements, or his conversations, of which he did most of the talking, was to express his desire of severing relations with his present firm and [966] going into the contracting business for himself.

Q. (By Mr. Black): What, if you recall, did you say to him with respect to any available Flintkote opportunity?

A. I told him the same thing as I had previously told Mr. Ragland, to convey to him, and that was that we had no opening for any further acoustical tile distribution in the metropolitan Los Angeles area.

Q. Was there any discussion at that meeting, if you recall, with respect to areas that were available?

A. There could have been either at that meeting or a subsequent meeting.

Q. You don't have any distinct recollection?

A. I don't have any recollection, whether it was at that meeting or a subsequent meeting when other areas were discussed.

Q. Do you recall anything else that bears on the matter of taking on this account or not taking on this account, that occurred at that meeting, that you now recall? A. No, I don't.

(Testimony of Browning Baymiller.)

Q. Did you have any further contact with the plaintiffs or either of them personally thereafter?

A. Personal contact was, I should say, something like, oh, from ten days to two weeks later.

Q. And how did that happen to occur?

A. That occurred by a previous arrangement by Mr. [967] Ragland for Ragland to meet Mr. Thompson and I at the same spot, same place, and that Mr. Lysfjord was to be there and he was also to discuss this with my superior, Mr. Thompson.

Q. Did such a meeting take place?

A. Yes, sir.

Q. Who was present?

A. Mr. Ragland, Mr. Thompson, Mr. Lysfjord and Mr. Waldron.

Q. And yourself?

A. And myself, yes.

Q. Did all of those persons stay together throughout that meeting? A. Yes, sir. [968]

Q. Now will you relate as near as you can recall the substance of what you remember of being discussed at that meeting, again, please, trying to observe the court's admonition to put this in terms of the substance of the conversation rather than your interpretation or conclusions as to what it signifies?

A. At this particular meeting the plaintiffs—it was Mr. Waldron who brought the portfolio which contained a number of contracts that he had signed up himself personally for his present employer—these contracts were presented to us for review,

(Testimony of Browning Baymiller.)

which we looked at, and Mr. Waldron or Mr. Lysfjord, one, so stated that these were permanent customers with them and these customers would follow them wherever they went, whether they be for themselves or for another firm.

Q. Do you recall what customers were discussed at this time?

A. I recall only one of the sheets of paper there. One of them was from Hayden-Lee, an engineering firm, and another I believe was Jackson Bros.

Q. What, if anything, was said in response to this discussion with respect to these two contractors, if you remember?

A. Of course the presentation of these contracts is highly effective for the purposes that Mr. Lysfjord and Mr. Waldron were after, and in looking at them there we could not [969] see where the additional business that we could derive from their operation with these people in this local area. However, it was mentioned there that each one of these contractors, whether they be a Los Angeles firm or not, do operate in other areas.

Q. Was there any discussion that you recall with respect to the territory available at that meeting? A. Yes, sir.

Q. What was said and who said it?

A. I am not able to say who said it. I believe that Mr. Thompson was more or less the spokesman for our group. And he mentioned the area of San Bernardino County and Riverside County,

(Testimony of Browning Baymiller.)

which is a fringe area for Southern California here, which was open for a new distribution.

Q. Was there anything said positively or negatively at that meeting about the availability of metropolitan Los Angeles? A. Yes, sir.

Q. And what was said in that connection, if you recall?

A. Mr. Thompson informed them that there was no opening at all, whatsoever, in the metropolitan area of Los Angeles.

Q. Do you recall whether there was any discussion of the possibility of following specific jobs into the Los Angeles territory one way or the other?

A. Yes, sir. [970]

Q. What was said in that connection, if you recall?

A. What was said in that was that Mr. Thompson informed the plaintiffs that in the event that they became exposed to or offered a contract in the metropolitan area by one of these so-called permanent customers of theirs, that that is an item that would be discussed at a later date and each case would be handled individually.

Q. Do you recall whether there was any discussion at that meeting as to what would be required in order to set up in business for themselves by the plaintiffs?

A. Yes, there was a discussion as to the capital required to operate such a venture, as well as a prospectus of the expected type of operation and

(Testimony of Browning Baymiller.)

the amount of business that they anticipated doing with their available capital.

Q. Do you remember whether there was anything said at that particular meeting relating to possible opposition of other contractors operating in this general area?

A. The conversation about that particular type of meeting there had been centered on area outside of Los Angeles metropolitan area.

Q. Do you recall anything said at all about objections?

A. Yes, I believe Mr. Lysfjord or Mr. Waldron, one of the two of them—I don't recall which—anticipated that we would have objections from other customers about our setting them up in San Bernardino and Riverside. [971]

Q. What, if anything, was said in response to that?

A. Mr. Thompson answered that to the effect that that particular area out there, that we reserved the right to establish a customer in that particular area without any protection at all for our present customers in Los Angeles.

Q. Do you recall whether Mr. Waldron stated at that meeting anything about the local contractors being organized? A. No, sir.

Q. Do you recall whether he made any statement, or either of the plaintiffs made any statement, at that meeting with respect to the fact that the local dealers were no competing?

A. No, sir.

(Testimony of Browning Baymiller.)

Q. Nothing of that sort was said?

A. No, sir.

Q. Was there any reference at that meeting that you remember as to the matter of the place where acoustical tile would be delivered?

A. A specific address, do you mean?

Q. The general area.

A. Yes, San Bernardino or Riverside.

Q. Was anything said about using material thus delivered in the Los Angeles area?

A. I don't understand your question, Mr. Black.

Q. Was there anything said about using material delivered [972] to the plaintiffs at Riverside or San Bernardino in the Los Angeles area to apply to jobs done here? A. Yes, sir.

Q. What, if anything, was said in that connection if you remember, and by whom?

A. Mr. Waldron asked the specific question, that in the event that we shipped them a carload of acoustical tile to Riverside or San Bernardino and they chose to haul the material back into the metropolitan Los Angeles area for use on a contract in this area, what would be our attitude toward that? [973]

Q. Do you recall any response that was made to that inquiry?

A. Yes, sir. Mr. Thompson answered that question.

Q. And in what way did he answer it?

A. Mr. Thompson's statement was that we would not condone such an arrangement, which

(Testimony of Browning Baymiller.)

would represent an absolute subterfuge of what the purpose of our agreement was.

Q. Do you recall anything else that took place at that meeting that you haven't related that bears directly on the plaintiffs' proposed operations?

A. No, I do not, other than after the meeting I got to thinking of thumbing through the list—the portfolio of contracts, and I begin to think about the type of material that they—that those contracts represented, and I would say that over 50 per cent of them was on decorative tile and not acoustical tile at all.

Q. What significance would that have with respect to the plaintiffs' operations?

A. It would have the significance, and that is, that decorative tile is not an item that is restricted to the sale of exclusive acoustical tile contractors. It is available from any acoustical—by any acoustical tile contractor or lumberyard or any qualified dealer, buyer, from many wholesales that are in the Southern California area.

Q. Do any of your acoustical tile dealers have any [974] preferential price for decorative tile?

A. No, sir.

Q. Did they at that time? A. No, sir.

Q. What items, in point of fact, were available to your dealers to whom you sold acoustical tile at a preferential price, over the general public, let's say?

A. You are speaking—available to the dealers, you mean, acoustical tile dealers?

(Testimony of Browning Baymiller.)

Q. Contractors.

A. Contractors. You want specific sizes, Mr. Black?

Q. No. No. I mean what commodities.

A. Our fibertile ranging in thickness from a half inch up to an inch and a quarter, and in size form 12 x 12 up to 24 x 48.

That was the fiber line. And our only other type of acoustical tile available at that time were metal pans.

Q. How about molding?

A. No molding. We have no moldings, other than the ones that are used in connection with metal pans.

Q. Starter strips. A. No starter strip.

Q. How about backing? A. No backing.

Q. How about siding? [975] A. Pardon?

Q. Siding?

A. What do you mean, siding? There is no acoustical tile—that is not an acoustical tile item at all.

Q. I see. Furring.

A. We have no furring strips that are available.

Q. Wallboard?

A. Wallboard is available through wholesale distributors, not direct from us.

Q. Insulating tile.

A. I assume you mean decorative tile?

Q. Yes.

A. That is available through wholesale distribu-

(Testimony of Browning Baymiller.)

tion, wholesale distributors, and not directly from us by the contractors.

Q. Was that all the situation that pertained at the time we are talking about?

A. That was in effect at that particular time.

Q. Now, when did you next have any connection with the plaintiffs' operations personally?

A. I had no personal contact that I remember between that time and at the time that we severed our business relations with the plaintiffs.

Q. Prior to the time of severing that relations, what information was brought to you that bore on the plaintiffs' [976] activities, that later led to that decision on your part?

A. Most of the information that I received in regard to the—any breach of agreement, which might have been going on at that time came to me second-handed through Mr. Lewis.

Q. Who is Mr. Lewis?

A. He is Mr. Harkins' assistant, of the manager of the building materials division.

Q. Did your duties require you to take any action personally with respect to that information?

A. In the absence, at that particular time, of—absence of Mr. Ragland, I did a little temporary work, yes.

Q. What did that consist of?

A. Well, I made a call at one, two—at a couple of our Los Angeles customers there.

Q. Why did you make those calls?

(Testimony of Browning Baymiller.)

A. I made those calls at the request of Mr. Lewis.

Q. What information did he give you that prompted you to call? A. Mr. Lewis?

Q. Yes.

A. He gave me the information that we had reports—we had had reports the plaintiffs, who at that time were our customers, had breached their agreement or understanding with us, and were operating in the metropolitan Los Angeles [977] area.

Q. Was there anything brought to your attention about complaints by any of your contractors?

A. No, not necessarily.

Q. At that time? A. At that time?

Q. Yes.

A. If there were complaints, why, they were given to Mr. Lewis and not myself.

Q. Whom did you see first in that regard?

A. If my memory serves me correctly, I saw Mr. Newport of Coast Insulation first.

Q. What did Mr. Newport say on that subject?

A. Well, Mr. Newport was wanting to know if we had taken on an additional customer in the metropolitan Los Angeles area, and I told him no, that we had not.

Q. Did he at that time make any threats about his relations with The Flintkote Company?

A. No, sir.

Q. Did he make any statements about boycotting The Flintkote Company? A. No, sir.

(Testimony of Browning Baymiller.)

Q. Where, by the way, is Mr. Newport at the present time, if you know?

A. I am told by a member of Mr. Newport's former firm [978] that he is on an extended trip in Europe.

Q. Where did you see Mr. Newport?

A. At Mr. Newport's office.

Q. What, if anything, did you state that Flintkote proposed to do in this connection?

A. This particular meeting was just to the point that we had nothing at hand, no facts at hand for us to take any action whatsoever, and that the case would be given just review and that a just decision would be made as to what we desired to do about it.

Q. Did you call on any of the other people at that time that dealt in Flintkote acoustical tile?

A. Yes, I called on Mr. Howard and I called on Mr. Hoppe of the Sound Control Company.

Q. Was there any meeting of all those people at any one time and place? A. No, sir.

Q. Did you ever hear of any such meeting?

A. No, sir.

Q. At any time during your contacts with these people, did you make any promises of any action that Flintkote would or would not take in connection with this matter? A. No, sir. [979-980]

Q. During this period did any of these people come to The Flintkote office while you were present? A. No, sir.

Q. What, if anything, happened in connection

(Testimony of Browning Baymiller.)

with this operation after Mr. Ragland's return to the Flintkote office, if you know personally?

Mr. Ackerson: Have you established that Mr. Ragland was away?

Mr. Black: He stated he was away. He said "in his absence."

Mr. Ackerson: I didn't hear it. I beg your pardon.

The Witness: The information was given to Mr. Ragland, in fact Mr. Ragland came to my office immediately upon his return, and I gave him the information that I had and what I had done up to date and for further instructions or further information why for him to see Mr. Lewis.

Q. When did you first learn personally that the plaintiffs had an office in Bell, California?

A. It was during the court of that week sometime.

Q. Had you seen anything that called to your attention prior to that time that there might or might not be a Bell address or a Los Angeles telephone number used by the plaintiffs?

A. I had seen nothing whatsoever.

Q. What next took place in connection with this matter [981] in which you personally participated?

A. The next event took place at the end of Mr. Ragland's report, his investigation and his report, when he, Mr. Ragland, Thompson and I were in Harkins' office and Harkins had reviewed the facts as presented to him by Mr. Ragland and had made his decision and instructed us what to do.

(Testimony of Browning Baymiller.)

Q. What did he instruct you to do?

A. Mr. Harkins' statement to us was that inasmuch as this firm known as the aabeta company had breached their agreement with us and had moved into the metropolitan area without our sanction and without our blessing, there was no reason to believe that such a subversive move at a later date might not happen again, and there was no reason to continue doing business with them even in San Bernadino and Riverside Counties.

Q. What, if anything, did you personally do after that conference?

A. In company with Mr. Thompson and Mr. Ragland I proceeded to the Bell Avenue address, the next day I believe.

Q. And who was present when you arrived there? A. Mr. Lysfjord.

Q. Did Mr. Waldron eventually come to that meeting? A. Yes, sir.

Q. And did that make five of you there?

A. That is right. [982]

Q. What was said to the best of your recollection at that conference?

A. Mr. Thompson was the spokesman for our group, and he informed them that with the establishment of the Bell Avenue place of business and operating in the metropolitan Los Angeles area, that that constituted a breach of our agreement and in that case it would be necessary for us to cease selling them merchandise.

(Testimony of Browning Baymiller.)

Q. What, if any, response was made by the plaintiffs or either of them to that statement?

A. The response appeared to be more of a shock than anything else. They could hardly understand. Either they understood it or they took the time to gather their thoughts together for an answer.

Mr. Ackerson: May I have that stricken, your Honor, as a conclusion?

Mr. Black: That probably is.

The Court: So ordered.

Tell us what they said.

The Witness: Mr. Lysfjord or Mr. Waldron, one of the two of them, asked then, "Do you really mean that we are no longer a Flintkote customer, that we can no longer buy?"

And Mr. Thompson answered that that is correct.

Q. (By Mr. Black): What, if anything, was said at that meeting in connection [983] with possible contracts or commitments that may have been made by the plaintiffs?

A. Mr. Thompson informed them that any contracts which they had on hand, that we would honor those orders and we would honor them regardless of the area, and we would furnish them at the low-down carload cost of what they had figured it at, so that they would suffer no financial loss whatsoever by the severance of this relationship.

Q. Do you recall anything else that was said at that meeting?

A. And it was also mentioned——

Q. By whom?

(Testimony of Browning Baymiller.)

A. By one of the plaintiffs, what about quotations that they had out on which they didn't yet have signed contracts.

And Mr. Thompson informed them that we would give them a reasonable length of time for them to convert any quotation or commitment that they had out into a contract, and we would so honor that order.

Q. Do you recall anything else?

A. That is all I recall.

Q. Do you know whether anything was said by anybody at that meeting about pressure from other contractors? A. No, sir.

Q. Is it that you don't recall it or that you state that that did not happen? [984]

A. I don't recall. I am sure the word "pressure" was not used.

Q. Do you recall whether anything was said by you, Mr. Ragland or Mr. Thompson about the matter of authority to make this decision, or higher-ups, or superiors, or anything of that general tenor?

A. I do not recall a conversation of that nature.

Q. Specifically did Mr. Thompson say that he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company?

A. He could have placed it with those words, but I do not recall his exact words.

Q. Do you have any recollection of anything being said on that score? A. No, sir.

Q. At any time up to this termination meeting, did you have any knowledge or notice of any busi-

(Testimony of Browning Baymiller.)

ness allocating plan among the acoustical tile dealers in the Los Angeles area? A. No, sir.

Q. Did you have any information regarding any plan to fix prices? A. No, sir.

Q. At any time prior to the termination was any information brought to you to the effect that if you did not discharge these plaintiffs there would be economic pressure [985] brought against you by the acoustical tile dealers that you dealt with in this area? A. No, sir.

Q. What, if any, contact did you have with the plaintiffs or either of them following this termination meeting, Mr. Baymiller?

A. The next personal contact was somewhat, I would say, a week or 10 days later, when the plaintiffs brought into my office a recap of their contracts that they had signed up, with their orders to us to furnish against the contracts that they had on hand. [986]

Q. Do you recall which one of the plaintiffs you dealt with at that time?

A. I believe, it is my recollection that they were both there.

Q. You are not sure of that, though?

A. I am not sure whether both of them stayed, but I believe that they both came in and one of them might have gone off—gone into another office.

Q. What did you say to the plaintiffs on that occasion?

A. I looked over the contracts they presented to me and with the orders they had to place against

(Testimony of Browning Baymiller.)

those contracts, and they were all bona fide orders against those contracts, of which I accepted them.

Q. Did you reject any orders?

A. I rejected one order that was not against one of their contracts. It was a materials sale.

Q. To whom was that?

A. The L. A. Downer Company of Riverside.

Q. In your narration of the various contacts you had with the plaintiffs, you didn't mention, Mr. Baymiller, meeting with Mr. Harkins at the plaintiffs. Were you present at any such meeting?

A. No, sir, I was not present at the meeting that the plaintiffs first met Mr. Harkins.

Q. Where were you at this time?

A. I was on an extended business trip into New Mexico and Texas.

Q. Did you have anything to do with a job at the Owens Roof Company?

A. I had nothing to do with the actual outcome or the execution of it. I will be happy to relate what I know, if you care to hear it.

Q. What do you know about that job, of your own knowledge?

A. Mr. Anderson, who is one of the salesmen that services the Owens Roofing Company, came into my office and said that a McLane of the Owens Roofing Company desired to buy some acoustical tile for the ceiling in his own office. We do not sell——

Mr. Ackerson: I object to that as not responsive, volunteered.

(Testimony of Browning Baymiller.)

The Court: You can't tell what you do not. Go ahead with the conversation.

Mr. Ackerson: Who was present?

Q. (By Mr. Black): Who was present, just you and Mr. Anderson?

A. Mr. Anderson and myself.

Q. What next developed in connection with that?

A. I told Mr. Anderson we respected the acoustical tile customers and do not sell them roofing, just like we [988] respect the roofers and do not sell the roofers the acoustical tile, so it would be necessary if he wanted to do that job himself to buy that material from one of our authorized acoustical tile applicators in the metropolitan L.A. area.

Q. Did you have any contact with the plaintiffs in respect to that job? A. No, sir.

Q. Did you make any reference to any particular dealer from whom that tile was to be purchased?

A. Yes, in Mr. Anderson's presence there I phoned the R. E. Howard Company and obtained a price on one-inch tile that Mr. McLane wanted, and I gave that price per square foot to Mr. Anderson, which was Mr. Owens—or Mr. McLane's cost from R. E. Howard, and I gave it to Mr. Anderson and that was the last contact that I had with that job.

Q. Did you at the time know who was going to do that job? A. No.

Q. Is there anything else I haven't covered, Mr. Baymiller, that bears directly on your relations with the plaintiffs or either of them, in connection

(Testimony of Browning Baymiller.)

with this matter? A. I believe not.

Mr. Black: Then that is all. You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Baymiller, I am going to show you Plaintiffs' [989] Exhibit 44. It purports to be the financial statement submitted at yours and Mr. Thompson's request, after that second meeting at the Manhattan Supper Club.

That was presented to Flintkote at the time they came down or about the time they came down to the Harkins meeting, wasn't it?

A. I don't know, your Honor—sir.

Q. Did you ever see it? A. I never did.

Q. You never saw it in your life before?

A. No.

Mr. Black: Mr. Baymiller, the reporter can't get a shake of your head or a nod.

Mr. Ackerson: The answer was no, Miss Reporter.

Q. (By Mr. Ackerson): Never until today did you see this document, Mr. Baymiller?

A. I don't recall ever having seen that document.

Q. You do recall it being requested and you do have knowledge that it was furnished The Flintkote Company, though, don't you?

A. I recall it was requested and I am sure it was furnished to us. If not that one, one that would be acceptable there for credit purposes.

(Testimony of Browning Baymiller.)

Q. The reason for requesting that document, as you have indicated, is to see just what these boys had behind them [990] by way of finances, wasn't it? A. That is right.

Q. So that that document was of particular interest to Flintkote and would have been examined quite thoroughly before you said, "O.K., you are in"? Before you gave them a line of acoustical tile. Pardon my slang.

A. Being in the sales department, that wouldn't, that document would have no interest to me. That would be for our credit department.

Q. Yes. But you do request it for your credit department? A. That is correct.

Q. Even before you decided to give these people a line of tile? A. That is correct.

Q. My question was, your credit department and whoever had the authority to give the line, would want to know what was in that document before doing it, wouldn't they? A. Certainly.

Q. Now, Mr. Baymiller, do you know of any contact, any written contact with these plaintiffs—strike that, Miss Reporter.

Was there any written communication of any type between Flintkote and these plaintiffs or either of them concerning these so-called rumors you have mentioned? [991]

A. I don't recall of any written contacts at all.

Q. When Mr. Lewis told you about them, why didn't you just call the plaintiffs up and ask them about them? Why didn't you ask them if they were

(Testimony of Browning Baymiller.)

doing business here, if you didn't know? You had their telephone number; Ragland had it.

Why didn't you just call them up and say, "Mr. Waldron, Mr. Lysfjord, are you doing business in Los Angeles here"?

A. I didn't have their telephone number.

Q. Well, do you know of any reason why, after you told Mr. Ragland about it upon his return, why he didn't call them on the phone and do it the easy way, just ask them?

A. He did when he found their phone number.

Q. What is it?

A. He did call them finally when he got their number.

Q. He called them. Did you hear Mr. Ragland's testimony? A. Part of it.

Q. Did you hear him say that as soon as he talked to you he went down to see them, he called them and made an appointment and went——

A. That is just what I said.

Q. Yes. All right. And you say you did not have a telephone number available to you.

A. I did not.

Q. Is that the only reason you didn't call them? [992]

A. I would not say it is the only reason, no.

Q. Your purpose was to find out, according to your testimony, whether or not they were doing business in the Los Angeles area. That was the basic purpose, wasn't it? A. That is right.

(Testimony of Browning Baymiller.)

Q. Then I take it you did not call Information and find out if aabeta co. was listed?

A. No, I did not.

Q. And what did these rumors have to say about where they were located? Did Mr. Lewis tell you where they were supposed to be doing business?

A. Mr. Lewis had the one address, but it was wrong.

Q. Well, you didn't call the Telephone Company and ask for aabeta co.'s number at that address then, did you? A. No, I did not.

Q. You didn't call the Telephone Company at all. The first thing you did was get a list of contractors from Mr. Lewis and go out and start making calls on them, is that right? A. No, sir.

Q. What was the first thing you did?

A. I called on, as I testified a moment ago there, I called on three of our customers and informed them that we were making a thorough investigation. If we had—if aabeta was operating in the L.A. area, and that we would give it a just review. [993]

Q. Did Mr. Lewis tell you to call on these three contractors? A. Yes.

Q. And he named Newport, Hoppe and Howard, didn't he? A. Yes, sir.

Q. Did he also name Gus Crouse out at Coast Insulating?

A. Well, Crouse and Newport would be considered in the same company.

Q. Did he tell you to see Crouse too?

A. No, sir.

(Testimony of Browning Baymiller.)

Q. Let's start with this first meeting at the Manhattan Club, Mr. Baymiller, that you attended.

I think we are all acquainted with who attended that. Mr. Thompson was not present and Mr. Waldron was not present at that meeting?

A. That is right.

Q. Otherwise it was you, Ragland and Lysfjord, is that right? A. Correct.

Q. And at that meeting Mr. Lysfjord did try to sell himself as an experienced salesman with contacts who could do a job for Flintkote, didn't he?

A. Yes, sir.

Q. And he mentioned many of these same contractors, the list of which were contained in this portfolio that [994] he brought later on?

A. That was at the next meeting.

Q. Yes, but at this meeting, at this first meeting, he mentioned those contractors in the sales talk to you, didn't he?

A. Those specific ones? I would say that he mentioned no specific ones. They might not have even had those contracts at that time.

Q. Not the contracts, but the contractors. He mentioned the people in this area that he had been selling, that he brought from the Coast company to the Downer company, that he brought into the Downer company for the first time?

A. Yes, sir.

Q. And that he would continue to sell those people? A. Yes, sir.

Q. He said that, didn't he? A. Yes, sir.

(Testimony of Browning Baymiller.)

Q. And, as a matter of fact, you asked him whether he could, didn't you?

A. I don't recall that I did ask him.

Q. Mr. Ragland said very little at that meeting, did he?

A. I would say that he didn't have much to say.

Q. The purpose of the meeting was to show to you that the high recommendations that Mr. Ragland had previously given [995] you concerning these two plaintiffs were true, he wanted you to meet them and approve them too, didn't he?

A. Yes.

Q. Now in the absence of Mr. Thompson at this meeting, your testimony was that you pointed out to Lysfjord that there was no opening in the Los Angeles territory, is that right?

A. That is correct.

Q. And that there was an opening maybe in Riverside and San Bernardino?

A. I don't recall that that was specifically talked about at that first meeting.

Q. Well, either at the first meeting or the second meeting at the Manhattan Club, isn't it true, Mr. Baymiller, that the gist of the conversation, as far as Mr. Thompson and yourself was concerned, was to this effect: We are not represented properly in Riverside and San Bernardino, it would help us to get you tile if you would agree to serve those areas also?

A. No, sir, that is not the gist of the conversation.

(Testimony of Browning Baymiller.)

Q. Well, let's pass to the second meeting, Mr. Baymiller.

At this meeting I think you are mistaken when you said Mr. Waldron brought the portfolio, I think it was Lysfjord who brought it. [996]

A. It could have been.

Q. At any rate, at this meeting this portfolio contained the names of Jackson Bros., Hayden-Lee and others, didn't it? A. Correct.

Q. And you say that after the meeting—and I take it while you were all still present—you examined those contracts?

A. No, it was during the meeting that I looked them over.

Q. In other words, you didn't take that portfolio home because Lysfjord was on his way to the Downer company with them to have them fulfill the contracts?

A. I had no use for the portfolio.

Q. I believe you stated that most of those contracts involved decorative tile, or half of them did, about half of them.

A. I would make an estimate of about half of them.

Q. And do you recall that there was—I don't know whether it was $20,000 or $50,000 worth of contracts in that portfolio—do you recall which it was?

A. I don't recall that any specific dollar value was mentioned.

Q. But it was a large dollar volume, wasn't it?

(Testimony of Browning Baymiller.)

A. I don't know. [997]

Q. By the way, tell me what is the difference between what you term decorative tile and just ordinary acoustical tile? What is the distinction, Mr. Baymiller?

A. Decorative tile is a tile that is manufactured of the same basic material as the acoustical tile but there have been mechanical alterations of the basic material that converts it into an acoustical tile that is used for purposes of noise reduction.

Q. What you are actually saying in a layman's language is that the two tiles are substantially identical, they are made by the same process out of the same material, but to put it simply, the distinction is you punch holes in the acoutical tile and you don't punch holes in the decorative tile? Isn't that about the difference as a practical matter?

A. Basically that is correct. However, you have different sizes and different thicknesses on your acoustical tile that you do not have in decorative tile.

Q. Yes, I realize that. And Flintkote made both of them at that time, didn't they?

A. That is correct.

Q. And so if I understand your testimony, Flintkote sold decorative tile to everybody that it sold acoustical tile to and in addition to that they sold it to lumber yards and everybody else, is that correct? A. That is not correct. [998]

Q. I misunderstood you. What is the statement?

A. We sell decorative tile to wholesale dis-

(Testimony of Browning Baymiller.)

tributors as a dealer item, who resell it out to acoustical tile contractors and to lumber yards.

Q. So that if Mr. Newport's firm, Coast Insulating, ordered a carload of 12 x 12 one-half inch or three-quarter inch tile, assorted acoustical tile, and they needed certain decorative tile to finish the job, the job for which the carload was ordered, you would not include in the carload that tile to Coast, but you would make them go to a wholesale yard here in Los Angeles to buy it?

A. That is correct.

Q. That is your policy as to selling?

A. We do not sell decorative tile direct to an acoustical tile contractor.

Q. Even though it is the same tile except for thickness and sizes without the holes in it?

A. It is sold under an entirely different type of merchandising and a different type of discounts and a different pricing system.

Q. I understand.

Now let me ask you this: The amount of decorative tile that the average acoustical tile contractor needs in the regular course of his business is a very, very small portion of the total tile he uses, isn't it? It is a negligible [999] amount?

A. Are you telling me or asking me?

Q. I am asking you. Isn't that about right?

The Court: He is always asking questions.

The Witness: The amount of decorative tile that is used by an acoustical tile contractor varies in accordance with the type of work that the man

(Testimony of Browning Baymiller.)

does. Some acoustical tile contractors will use a world of decorative tile, others will not use very much.

Q. (By Mr. Ackerson): Well, let's take public works like schools and hospitals and things of that sort. In the average job that the acoustical tile contractor performs in that type of public works, is there much decorative tile used?

A. Prior to 1952 it was heavy to decorative tile; since 1952 and 1953 it is heavy to acoustical tile.

Q. I don't quite understand that. Prior to 1952, you mean to say that those jobs consisted mostly of decorative tile? A. Yes, sir.

Q. More decorative tile than acoustical tile?

A. Yes, and there is a reason for that.

Q. I just want the answer. You can give the reason later if you wish.

And since 1952 it is what, substantially all acoustical tile? [1000]

A. It is heavier towards acoustical tile.

Q. What do you mean "heavier"? Do you mean substantially all? A. Heavier in footage.

Q. Substantially most all of the footage is acoustical tile?

A. Not all of it, but I would say the biggest percentage of it is acoustical tile.

Q. Now you recognized some of the names of these contractors contained in this portfolio that Lysfjord brought along at this second meeting, didn't you?

A. I recognized—I recalled only two of them.

(Testimony of Browning Baymiller.)

The Court: Are you going to another subject, Mr. Ackerson?

Mr. Ackerson: Yes. This is as good a time as any.

The Court: We will take up Hutchinson v. Pacific Atlantic Steamship Company in chambers. Will the reporter and the clerk please come to chambers for that purpose.

The case presently on trial will stand adjourned until tomorrow afternoon at 1:30 p.m.

(Whereupon, at 4:40 o'clock p.m., an adjournment was taken until 1:30 o'clock p.m., Thursday, May 19, 1955.) [1001]

May 19, 1955, 1:30 P.M.

The Court: The jury and alternate being present, you may proceed.

Mr. Ackerson: Will you resume the stand, Mr. Baymiller?

BROWNING BAYMILLER

the witness on the stand at the time of adjournment, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination
(Continued)

By Mr. Ackerson:

Q. As I recall, Mr. Baymiller, yesterday we had covered your lack of knowledge of the financial statement and had gotten up to and including about the first meeting at the Manhattan Club.

(Testimony of Browning Baymiller.)

And I believe we started on the second meeting at the Manhattan Club in which five of you attended.

You stated that you had examined the portfolio of contracts which, I believe, Mr. Lysfjord brought along, and perhaps they were contracts of both these parties, I don't know, both Waldron and Lysfjord, but whether that be so or not I believe you stated that the presentation of these contracts was highly effective for the purposes of the plaintiffs, that they had in mind. [1003]

Do you recall that statement in substance, a statement like that? A. Yes, sir.

Q. And the purpose these people had in mind was to get Flintkote tile for application in the Los Angeles area, wasn't it? I am not asking you what you told them, but that was the purpose for which they presented those contracts, wasn't it?

A. Not specifically.

Q. But partially? A. Partially.

Q. Yes. Now, you stated, as I recall, you couldn't see where Flintkote could make much money or be benefited greatly by having work from those contractors, but I assume that you meant work in the San Bernardino area from those contractors, didn't you? A. I don't recall making that statement.

Q. I will ask you a different question then. You saw the contracts and they were substantial contracts, were they not?

A. I looked over them briefly, yes.

(Testimony of Browning Baymiller.)

Q. They were with substantial contractors, weren't they, general contractors?

A. They were with general contractors.

Q. They were all Downer's contracts, weren't they? All the work was to be performed by Downer Company? [1004]

A. I assume they were. I had no evidence, other than the contractors' original contracts.

Q. Now, the Downer Company at that time didn't handle Flintkote tile at all, did it?

A. They did not.

Q. So that as long as Downer Company continued to get these so-called accounts of Lysfjord or Waldron, Flintkote was out in the cold, so to speak, weren't they?

A. On Downer contracts?

Q. Yes.

A. We did not solicit Downer business at all.

Q. But any contracts Downer got for acoustical tile, Flintkote couldn't participate in, could they, couldn't furnish the tile for?

A. We may not choose to furnish it.

Q. You didn't at the time?

A. We didn't furnish it, no.

Q. No. Assuming that Coast Insulating were successful in taking one of these general contractors away from the Downer account, you—by you I mean Flintkote—had no assurance that Coast would use Flintkote tile on the job, did you?

A. We had no absolute assurance, no.

(Testimony of Browning Baymiller.)

Q. No. They could have used what brand of tile?

A. On most of the contracts they could have bought any [1005] Tom, Dick or Harry tile. Most of the—the majority I saw were decorative tile.

Q. Let's take the acoustical tile contracts. You said your recollection was that half of them were for acoustical tile. What other brand of AMA acoustical tile could Coast have used? They have another brand, don't they?

A. Oh, yes. They had Simpson brand, which could have been used, providing that would have met the requirements of the specification.

Q. It will meet any AMA requirements?

A. That is a rather loose statement to make.

Q. Well——

A. It will not meet any AMA requirements.

Q. Well, as far as Coast is concerned at least, providing the Simpson tile met the requirements—you don't have any agreement with Coast that they will use Flintkote tile exclusively, do you?

A. No.

Q. Or halfway or anything at all?

A. No. We have no assurance that they will give us a nickel's worth of business, for that matter.

Q. That is right. They could divert it all to Simpson, couldn't they?

A. They could if they so desired.

Q. That is right. And the same thing goes with Howard, only he could divert it to U. S. Gypsum tile?

(Testimony of Browning Baymiller.)

A. That is right, providing their tile would meet the specifications.

Q. And you don't deny the title would meet the specifications 99 times out of a hundred, do you, in public works?

A. It all depends on how the specification is written, Mr. Ackerson, and you would have to look at each individual specification to answer that question.

Q. It is AMA approved title, is it not? It is tested by AMA and has an AMA rating, doesn't it?

A. I only regret that you don't understand the values [1007] out of the AMA catalog a little better.

Q. Can you answer the question? It does have an AMA rating, doesn't it?

A. In regard to sound absorption, yes.

Q. And it is used on public works, isn't it?

A. Where it meets the specifications.

Q. And it does usually meet the specifications, doesn't it?

A. It all depends on how the specifications are written and the requirement of the specifications.

Q. Tell me a public work that you know—you know, don't you, Mr. Baymiller, that any public works contract has to have an "or equal" clause in it, doesn't it? A. That is right.

Q. In other words, a contractor in a public works contract can't say, "I want Flintkote tile and that is all"?

A. He can say "I want Flintkote tile or an approved equal."

(Testimony of Browning Baymiller.)

Q. That is right, "or an approved equal."

Now you tell me one specific instance in your mind in a public works where U. S. Gypsum tile was not considered an approved equal to Flintkote acoustical tile.

A. I am unable to do that because I am not specifically familiar with every job that comes up.

Q. But you can't recall one job in the history of [1008] your association with Flintkote where that wasn't so?

A. It has not been brought to my attention.

Q. That is right. And the same thing would go with National Gypsum tile? A. That is true.

Q. So that you state that these plaintiffs were told that they couldn't sell these established customers of their Flintkote tile in Los Angeles, is that what you said, that they could not continue to sell these customers Flintkote tile in the Los Angeles territory here, and that that was stated to them at that meeting?

A. Would you restate the question, please?

Q. Maybe I can simplify it. It was rather involved.

I understood you to testify that at this second meeting either you or Mr. Thompson told these plaintiffs that they no longer would be able to sell these customers that were listed on these contracts—I am talking about Hayden-Lee, Jackson Bros., and so forth—they could no longer sell them if they got Flintkote tile.

A. They were told that they could not execute

(Testimony of Browning Baymiller.)

any contracts for these particular contractor customers of theirs in the metropolitan Los Angeles area.

Q. They were told that, you are stating, at that meeting?

A. They were told that at the second [1009] meeting.

Q. That is what we are talking about. And Mr. Thompson told them, I believe you said?

A. Mr. Thompson told them that in the event that they came up with one of those jobs at a later date that we would talk about it on each individual case, and we may or may not sanction it.

Q. Even though Flintkote couldn't sell the tile otherwise? In other words, they had to go out and get a contract with Jackson Bros. for a couple of markets and then come in to Mr. Thompson and say, "Now, can we execute this contract?" Is that what you are saying?

A. That would be the specific individual case that we would review at that time.

Q. And suppose you found that unless you approved this contract, which they obviously couldn't get if they didn't have the tile in advance, but assume they could, suppose you found that Mr. Howard was going to put U. S. Gypsum tile in the job unless these people got it, would you let them do it? A. It would be perfectly all right.

Q. And the same thing would be with Hayden-Lee? A. Certainly.

Q. And the same thing would be with any other

(Testimony of Browning Baymiller.)

general contractor here, whether it was these people that they had special contacts with or not, is that right?

A. Mr. Ackerson, the selling of a contract to a general [1010] contractor is handled mainly by the acoustical tile contractor, and we do not become involved in that until such time as one of our customers or one of some competitor's customers has that contract.

Q. That is right. But isn't it true from your own experience, Mr. Baymiller, that it is impossible for an acoustical tile contractor to go out and solicit and actually pledge himself, and obligate himself to orders unless he can get the tile, unless he knows he has it? Is that what Mr. Thompson expected these people to do, according to your statement?

A. Well, we executed the terms of our agreement on those contracts which the plaintiffs presented to us upon termination of the association.

Q. Yes, but that doesn't answer my question. I am asking if that was the purport of what Mr. Thompson told these plaintiffs at this second Manhattan Club meeting.

A. He told them that in the event that they had a contract like that we would look at it at a later date at the time that the order came up and we would tell them at that time whether we would or would not permit the execution of that contract in the Los Angeles area.

Q. And was that statement limited to just these contractors named in this portfolio of contracts,

(Testimony of Browning Baymiller.)

or did it apply to any other contractor in the Los Angeles area? [1011]

A. It was not limited to the names of the people who were in the portfolio because we had no record other than just the memory of a couple of them that were in them.

Q. Then it meant any contractor, didn't it?

A. Yes, it could have meant any.

Q. Then I take it that the gist of Mr. Thompson's statement was only this—wouldn't the effect of that statement be this, Mr. Baymiller—that we won't consider giving you tile for an executed contract until it is executed? That is about the gist of what you say Thompson told them, wasn't it?

A. No, before the plaintiffs—they are certainly wise enough to have contacted us to find out whether they should take the contract or not in a case like that. [1012]

Q. I think they are very wise, but I mean that wasn't part of Mr. Thompson's statement, was it?

I mean there was nothing said that "You are wise enough to do this or do that," was there?

You thought they were wise enough to be Flintkote dealers——

A. Contracts were not mentioned. It was just jobs, specific jobs. Now, that could be before the contract was signed or before it was even bid.

Q. So that now you say that the gist of Mr. Thompson's statement wasn't, "Present us with the contracts and we will decide"?

Mr. Black: That is objected to. That is assum-

(Testimony of Browning Baymiller.)

ing a fact not in evidence. This witness has testified as to specific jobs and we object to putting a construction on it that doesn't bear out what the witness has testified on direct examination.

Mr. Ackerson: I understood he said specific jobs, yes, specific contracts.

The Court: The objection is overruled. But if the witness has been misunderstood, he may clarify it in his answer.

The Witness: I would say that the reference in this conversation was made to jobs, which would represent the jobs in progress of being bid for the general contract and up to the time the order or contract was actually let. [1013]

Q. (By Mr. Ackerson): Well, then, let me see if I have it straight. Then Mr. Thompson meant, according to your understanding, that all they had to do was clear each job in the Los Angeles territory with Mr. Thompson in advance?

It almost boils down to that, doesn't it?

A. But they had no assurance that the answer would be in the affirmative.

Q. No, that is what I am getting to. Why did Mr. Thompson want them to clear it in advance? Was it because Mr. Thompson wanted to make sure that none of the other established contractors could do it? Did he say anything along that line?

A. No, sir.

Q. Did he state any other reason why he wanted this clearance in advance?

A. He stated no other reason. There were no

(Testimony of Browning Baymiller.)

further questions asked by Mr. Waldron, after he asked Mr. Thompson the question, if he could haul material back into the Los Angeles area.

Q. Well, at this meeting Mr. Thompson requested the financial statement, and that was submitted later. A. That is correct.

Q. I believe you stated, Mr. Baymiller, that Mr. Waldron or Mr. Lysfjord did make the statement that there would be objections by competing contractors when they got [1014] the tile—if they got your line of tile? You stated that, didn't you?

A. Yes, I stated that.

Q. Let me ask you this question: Didn't Mr. Thompson—almost his exact words were, or, at least, substantially his words were this—to the effect that Mr. Lysfjord and Mr. Waldron didn't need to worry about this pressure, that Flintkote was big enough to take care of itself? Wasn't that about the gist of it?

A. I am sure the word "pressure" wasn't used.

Q. All right then. Suppose he used the words "Don't worry about force or anything"——

A. The substance of Mr. Thompson's answer was that we anticipated no opposition in the San Bernardino and Riverside areas. We reserved the right to choose our customers in that area or in any other area.

Q. Well then, isn't it a fact that Mr. Thompson didn't mention the San Bernardino or Riverside areas?

He told them they needn't worry, that Flintkote

(Testimony of Browning Baymiller.)

was big enough to take care of itself? That was just about the words be used, wasn't it?

A. By this time in the meeting or in the conversation——

Q. Can you answer that yes or no?

A. State the question again.

Q. Mr. Thompson's words were, to the effect, and had no [1015] reference, No. 1, to the Riverside area, did it, in that respect——

A. He made no reference to the Riverside area. By that time in the meeting the plaintiffs had understood that was the area they were to be operating.

Q. So Thompson didn't say Riverside and San Bernardino in his reply?

A. It wasn't necessary to do that.

Q. But he didn't say it, did he?

A. He did not say it because the plaintiffs by that time understood the area we were talking about.

Q. At least, that is your present opinion, that the plaintiffs understood it? A. Yes, sir.

Q. I wanted to know merely whether Thompson actually said it.

Now, you were asked whether or not Waldron pointed out to you or stated in substance and effect that acoustical tile contractors in this area had gotten together and were organized.

Did he make any statement to that effect?

A. I don't recall any such statement.

Q. But you do know as a representative of

(Testimony of Browning Baymiller.)

Flinkote, assistant sales manager of Flintkote, that all of the sources of AMA tested tile that was sold in this area, at that time, were in the hands of the acoustical tile contractors already [1016] then operating in Los Angeles, did you not?

A. Yes, I understood—I would make that statement, that the lines were all taken up.

Q. Yes. And you knew, didn't you, that their chance at that time of becoming competitive acoustical tile contractors depended upon whether Flintkote made them authorized dealers of its line?

A. No, I cannot say that the success of their operation would depend on our decision.

Q. Was there anything said at that meeting, Mr. Baymiller, that would lead you to believe that they would cease their connections with the Downer Company and the remuneration they were getting there then, unless they got Flintkote tile?

A. I don't know as it was said at that meeting, but I was told either on the telephone or at one time by the plaintiffs that their intentions were to sever their relations with R. W. Downer Company.

Q. If they could get Flintkote tile?

A. That was not in the conversation at all.

Q. Who was it, one of the plaintiffs, you were talking to on the phone? A. Yes.

Q. When was that?

A. I cannot recall the exact date.

Q. Was it before the first meeting at the Manhattan Club? [1017] It must have been, wasn't it?

(Testimony of Browning Baymiller.)

A. No.

Q. It was after that, was it?

A. It must have been after that or it might have been at that meeting.

Q. In other words, they were going to sever their connections with the Downer Company whether or not they got any tile or not, is that what you stated?

A. That was not specifically stated.

Q. Now, you stated that you went out to see Newport, Howard and Hoppe after you talked with Mr. Sidney Lewis. A. Correct.

Q. You went out to their offices and you had a conversation with each of them, Mr. Newport, Mr. Hoppe and Mr. Howard? A. Correct.

Q. Is that correct? A. That is correct.

Q. As I gather from your testimony, you wanted to find out whether or not these plaintiffs were doing business in the Los Angeles territory.

A. That was not the purpose of the visit to those three customers.

Q. I don't think it was, either, Mr. Baymiller. I think the purpose, and I suggest—— [1018]

The Court: We don't care what you think it was.

Mr. Ackerson: I am sorry.

The Court: Go ahead and ask the question.

Q. (By Mr. Ackerson): The real purpose and your instructions from Mr. Sidney Lewis was to go out there and see what you could do to placate these people about this Los Angeles business, wasn't it, Mr. Baymiller? A. No, sir.

Q. Was there any other purpose in finding out

(Testimony of Browning Baymiller.)

what knowledge they had about these plaintiffs being in business in the Los Angeles area?

A. No, sir.

Q. That was the only reason?

A. Do you want to know the reason? Do you want to know the reason I went out? Do you care to ask that question? I will answer it.

Q. You have stated it, that was the reason, didn't you, that you went out there to find out what they knew about these people operating in Los Angeles?

A. I did not make such a statement as that.

Q. Was there any reason why you couldn't have called these three customers of Flintkote on the telephone?

A. I think perhaps I did call them and made an appointment with them.

Q. Was there any reason why you couldn't ask them that [1019] question over the telephone?

A. Ask them what question?

Q. What they knew about this Los Angeles operation?

A. I did not go out there to find that out.

Q. You went out there under the instructions of Mr. Lewis, though, didn't you?

A. Yes, sir. [1020]

Q. And he told you that he had received rumors from these people about these plaintiffs' operations, didn't he? A. That is correct.

Q. You did have these three customers' telephone numbers, didn't you, Mr. Baymiller?

A. Yes, sir.

(Testimony of Browning Baymiller.)

Q. Now you stated that when you got out to Mr. Newport, the No. 1 call, Mr. Newport wanted to know if you had established a new dealer in the Los Angeles area, is that right?

A. That is correct.

Q. And you said no? A. That is correct.

Q. And that is about as far as I got from your direct examination of what happened.

Now I want to ask you, what did Mr. Newport want you to do about it? Did he want you to cut them off? A. No, sir.

Q. What did he suggest?

A. He merely asked me if we had established an additional dealer in the Los Angeles area. The answer was that we had not.

And then I took up the conversation and said that we had rumors that our San Bernardino and Riverside outlet was beginning to solicit business in the Los Angeles metropolitan area, and that we were making an investigation and if we [1021] found that there was such activity going on that we would review the case and make a just decision on what we would do about it.

Q. That is all that happened? That is all the conversation you had?

A. It was a very short meeting.

Q. And Mr. Newport did not suggest any action to you at that time? A. No, sir.

Q. Did he tell you that he had already conferred with Mr. Lewis or Mr. Harkins? A. No, sir.

Q. But Mr. Lewis told you, didn't he?

(Testimony of Browning Baymiller.)

A. Mr. Lewis told me.

Q. So that your answer yesterday was the same as today, it was limited to what he said to you personally, not what he may have said to Lewis or to Harkins or anyone else? A. That is correct.

Q. And he had no suggestions? That is all that happened? That is all that did happen out there?

A. That is correct.

Q. And you had his telephone number before you left?

A. Most certainly I had his telephone number.

Q. Did you call him for this appointment?

A. I don't recall whether I called Mr. Newport or I [1022] called his secretary for the appointment.

Q. Well, now, did you call Mr. Howard for the appontment you had with him out at this place?

A. Yes, I called Mr. Howard.

Q. What did you ask Mr. Howard?

A. I asked him no questions whatsoever.

Q. Didn't Mr. Howard object to these people being in business here?

A. They were not in business here.

Q. Didn't he object to their soliciting contracts here? A. Not necessarily.

Q. What did he say in that regard?

A. He just asked me virtually the same thing as Mr. Newport did, as to whether or not we had set up an additional customer in the Los Angeles area.

Q. But he made no objections to you personally

(Testimony of Browning Baymiller.)

on that fact? A. No, sir.

Q. Or objected to these rumors of these plaintiffs soliciting business here?

A. No objections to me.

Q. And that happened out at Mr. Howard's place, according to your testimony, according to your best recollection? [1023]

A. It was not at Mr. Howard's place. I met Mr. Howard for lunch at a little cafe just north of Slausson.

Q. Right next to his place out there?

A. No, I would say it is five or six blocks away.

Q. And at no time during that meeting Mr. Howard objected to the solicitation of contracts here by the plaintiffs, is that your statement?

A. We had no direct or no concrete facts or evidence that there was business being solicited here. At that time we had not established the extent to which the plaintiffs had entered the Los Angeles field.

Q. I still don't understand what Howard said, then. What was his total statement to you on this luncheon meeting?

A. Well, Mr. Howard merely accepted my explanation there that we at that time were gathering the facts of the case for review.

Q. What did he say? Who opened the conversation? You went out there to see him. What did you say?

A. I don't recall that conversation verbatim.

Q. Did you say, "Mr. Howard, I am out here

(Testimony of Browning Baymiller.)

to investigate the activities of the plaintiffs in the Los Angeles area"?

A. I would not be investigating it at Mr. Howard's place of business.

Q. Did you say, "Mr. Howard, I came out here to [1024] investigate your feelings in the matter"?

A. No, sir.

Q. What did you say?

A. I believe I have answered that question several times, Mr. Ackerson.

Q. You said that when you find out the facts——

A. That is what I said.

Q. ——you will arrive at a just decision?

A. Yes.

Q. And that is all you said?

A. That is all I said in regard to this subject.

Q. What did Mr. Howard say when you said that?

A. Mr. Howard said, "Well, I will buy that as far as the activities are concerned, and when you establish your case, why that is your decision on it, it is perfectly all right with us."

Q. Did Mr. Howard tell you that he had been down to see Mr. Lewis or Mr. Harkins about it?

A. No, sir.

Q. Though Mr. Lewis told you?

A. No, Mr. Howard I am sure was not down into our office.

Q. You didn't see him there?

A. I didn't see him down there.

(Testimony of Browning Baymiller.)

Q. But Mr. Lewis told you Mr. Howard had contacted [1025] him about these rumors?

A. Mr. Lewis did not tell me that Mr. Howard had contacted him.

Q. Did he tell you the R. E. Howard Company had contacted him? A. No, sir.

Q. He told you to go out and see Howard?

A. He told me to call on our present Los Angeles customers.

Q. Now you have related the whole conversation with Howard, haven't you?

A. As much as I can recall.

Q. Can you recall of any reason, if that is all you had to say, why you didn't call him on the telephone?

A. Well, I don't say that I did not call him on the telephone.

Q. Why you couldn't have consummated that conversation over the telephone just as easily?

A. Being in the sales department we do more than telephone contacts with our customers.

Q. That is your only explanation?

A. Yes, sir.

Q. Now I assume your statement would be about the same with respect to Mr. Hoppe, wouldn't it? Are there any substantial differences in what happened with Mr. Hoppe? [1026]

A. No difference whatsoever. It was all the same.

Q. You went out to his place and went through the same thing? A. Yes, sir.

(Testimony of Browning Baymiller.)

Q. No additions, no substractions, in substance?

A. Very much the same thing.

Q. And your statement that no one of these three people suggested by act, word or deed, that you terminate these plaintiffs if you found they were doing business in the Los Angeles area?

A. There was no statement of that kind made to me by any of our customers.

Q. Made to you, at least to you?

A. That is what I said, made to me. [1027]

Q. Yes, I understand. Let's get to this. When Mr. Ragland got back—you completed your investigation, now, I believe, haven't you, insofar as this Los Angeles business is concerned?

That is all you did, I take it?

A. That is all I did. I made no investigation whatsoever.

Q. Then you went back to—now, let me ask you, did any of these two or three people during these conferences you had with them or these meetings you had with them, suggest the general locality of where the plaintiffs were alleged to be doing business?

A. No, I had no knowledge of where they were.

Q. Did any one of the three of them ever tell you that they understood they had gotten this Van Nuys Hospital job?

A. No, sir, I do not recall any name at all mentioned of Van Nuys Hospital job.

Q. Do you know where Mr. Ragland got those

(Testimony of Browning Baymiller.)

three jobs he was going to investigate? Did you give them——

A. I don't know, I didn't know he had three jobs to investigate.

Q. You didn't give them to him, anyway?

A. No, sir.

Q. When Mr. Ragland got back he came directly to your office, didn't he?

A. I believe I was the first party he talked with in our office.

Q. You told him about these rumors? [1028]

A. I told him about the rumors and I told him about my three calls to our three customers, and what I had told them and they had accepted it, what I had told them, and we were just waiting for him to get back to make an investigation of the plaintiffs' activities.

Q. Then you sent him into Mr. Lewis' office, is that right?

A. I don't know as I sent him. I suggested he go to see Mr. Lewis and he did.

Q. He did? A. Yes, he did.

Q. Now, do you know anything further about what Mr. Ragland did after that? Do you know he went on and made an investigation?

A. I knew nothing further of the investigation until I saw a copy of Mr. Ragland's report that was made out to Mr. Harkins.

Q. You don't know what the instructions from Mr. Lewis were, do you?

A. I do not know the instructions, no.

(Testimony of Browning Baymiller.)

Q. You don't know what he did after those instructions, do you?

A. His specific activities, I do not know.

Q. When did you first learn that he had the number of the aabeta co. in Bell?

A. Oh, I would say that was something like one, or possibly two days before the termination visit of Mr. Thompson and Mr. Ragland and [1029] myself.

Q. Isn't it a fact that Mr. Lewis told you that these rumors included and added to the fact that they had set up a business address in Bell, California, or thereabouts? A. No.

Q. Now, you have stated you were on an extended visit some place else on business, I believe, at the time these two plaintiffs were brought in and introduced to Mr. Harkins, is that correct?

A. I was, yes.

Q. How long did that visit continue, Mr. Baymiller, thereafter? I mean did you return to town shortly thereafter?

A. Well, that particular trip that I was on takes probably ten days. I don't know whether it was one day or nine days after they were in the office when I returned.

Q. You were back in town, I assume, somewhere around the end of the first week in January of '52?

A. No, I was back in town before Christmas.

Q. So that this introduction to Harkins must have been prior to Christmas? A. Yes.

(Testimony of Browning Baymiller.)

Q. Well, none of us have been able to fix that date exactly, so you have helped.

A. Well, I am glad that I was of some help.

Q. When you called Mr. Ragland into your office or met him upon his return, it was your purpose to apprise him of what you had done and to put him to work on this investigation, wasn't it? [1030]

In other words, you were pinch-hitting for him while he was out of town, I believe you said. You didn't use "pinch-hitting."

A. That is right. I made the three calls which would normally be Mr. Ragland's chore. I made them while he was out of town.

Q. And then he picked up and carried on the investigation? That was the purpose of you seeing him?

A. I repeat I was not on an investigation myself. He started the investigation upon his return.

Q. You talked to him to get him started on it, is that it? A. Yes, sir.

Q. To your mind was there any necessity for Mr. Ragland to get in contact with Messrs. Howard, Hoppe, Newport or Krause?

A. Not that I know of, no.

Q. There would be no necessity for it?

A. I don't know as he did.

Q. But you can figure out no reason why he should cover the same ground, can you?

A. No.

Q. Mr. Baymiller, I want to get it straight

(Testimony of Browning Baymiller.)

again, so far as you are concerned, so far as your testimony is concerned, there was only on difficulty and that is the plaintiffs doing business in Los Angeles?

There wasn't anything else concerned, was there?

A. That is all. [1031]

Q. That is all. I mean that is all there was to it.

Have you ever seen Mr. Ragland's report? I believe you stated——

A. Yes, I read the report back there at the time when it was presented, I believe, in January or—of '52.

Q. That was at the time Mr. Harkins told the three of you to go out and terminate, wasn't that it?

A. That was a few days—the report was a few days prior to that, yes.

Q. And you read it? A. Yes, I read it.

Q. What was the purpose, if you know, of Mr. Ragland investigating the Orange Coast College job?

A. I do not know. I am unable to answer that.

Q. What was the purpose, if you know, Mr. Baymiller, of Mr. Ragland investigating some rumor that these plaintiffs had stolen some documents from the Downer Company?

A. I didn't know he was investigating that.

Q. At least, you know of no reason for it, in connection with this? A. None whatsoever.

Q. I assume your answer would be the same in connection with the credit inquiry from Stanton

(Testimony of Browning Baymiller.)

Lumberyards, mentioned in his report, that had nothing——

A. I recall the casual mentioning of it, which I considered very insignificant.

Q. It was a matter he found—you can find no [1032] significance to it in connection with this question of whether or not they were doing business, the plaintiffs were doing business in Los Angeles?

A. No, absolutely not.

Q. Do you know anything, Mr. Baymiller, about the reason for not—in line with Mr. Thompson's statement at the termination meeting, that he would supply them tile for their commitments after termination? Do you recall that statement?

A. Yes, sir.

Q. Do you recall whether you testified that Flintkote complied with that with the exception, with the exception of two orders of tile, I believe, to the Lewis A. Downer Company of Riverside, is that right? A. That is correct.

Q. Did you refuse that order or did Mr. Thompson? A. No, I refused it.

Q. Well then, I can ask a direct question: Isn't it a fact that you refused that because you had heard from other acoustical tile contractors that was going on this Orange Coast College job?

A. No, sir.

Q. Isn't it a fact that you or Flintkote, to your knowledge, refused to supply Flintkote tile to this firm in Bakersfield because you found it was going on the Orange Coast College job?

(Testimony of Browning Baymiller.)

A. I know nothing about any refusal of a Bakersfield order. If that order is the same one, I didn't even know the [1033] order I turned down for Louie Downer through the plaintiffs here, I didn't even know what job that was. [1034]

Q. But my question was, you didn't know it was going to go on that job?

A. I didn't know it was the Orange Coast College job. I just saw it was a material sale and I had been instructed by my superiors not to accept anything except on their firm contracts.

Q. And you had no contact with any refusal to supply tile to Bakersfield which was going to be used on it?

A. No, I do not recall any contact at all on that.

Q. Do you know who got the Pacific Coast College job? A. I have no idea.

Q. Or who had it at the time?

A. I have no idea.

Q. Well, that brings us up to this termination meeting. As I recall it, your, Mr. Thompson and Mr. Ragland were all called into Mr. Harkins' office, the three of you? A. That is correct.

Q. And Mr. Harkins instructed the three of you to go out to the Bell address and notify these people that they could no longer buy Flintkote tile?

A. Yes, sir.

Q. That was your sole purpose in going out there?

A. That and to explain to them on the terms of how we were terminating them.

(Testimony of Browning Baymiller.)

Q. Did either you or Mr. Thompson ever contact either [1035] of the plaintiffs to get their story on the matter before you terminated them?

A. No.

Q. Your sole knowledge, or Flintkote's sole knowledge, then, were rumors and whatever information Mr. Ragland was alleged to have gotten by contacts out there, a visit out there? Whatever information you got from the defendant on the subject came from Mr. Ragland, is that right?

Mr. Black: You mean from the plaintiffs?

Mr. Ackerson: About the plaintiffs.

Mr. Black: You said from the defendants.

Q. (By Mr. Ackerson): About the plaintiffs came from Mr. Ragland's report, is that right?

A. Are you wanting to know the reason for the termination?

Q. No, I want to know whether or not either you or Thompson or Harkins ever contacted the plaintiffs directly in connection with this subject at all. A. With the Bell operation?

Q. Yes.

A. We did not until we went down to terminate them.

Q. Well, now, did Mr. Harkins when he called the three of you in, that would be what, the sales manager, the assistant sales manager and the promotion man for acoustical [1036] tile, that was your respective titles, wasn't it?

A. That is right.

Q. And when Mr. Harkins called you in his

(Testimony of Browning Baymiller.)

office, did he make any statement or explanation as to why these three executives should go to the client to deliver this message? Was there any reason given?

A. You mean reason for sending the three of us?

Q. Yes.

A. I do not recall that he told the three of us to go. He instructed Mr. Thompson and Mr. Ragland and I believe that I was invited along by Mr. Thompson.

Q. But he called all three of you into the office that morning just before you left?

A. I am not too sure that we went directly that same day because Mr. Ragland had to make an appointment with the plaintiffs to be sure that they would be there.

Q. If Mr. Ragland's recollection was that he called for an appointment 30 minutes after this Harkins meeting and went out directly thereafter, would that refresh your recollection on it?

A. Well, that could be, that same morning or it could have been the next morning.

Q. Now is Flintkote accustomed as a matter of practice to intiate, effectuate a matter like cutting a client off, without any written notification? Is that a custom down [1037] there?

A. It isn't often that we have occasion to take such action.

Q. But you do have similar actions to take. Isn't it true you usually do it by a formal written

(Testimony of Browning Baymiller.)

notification? A. No, sir.

Q. That isn't true?

A. We do not have formal written contract agreements.

Q. No, you misunderstood me. Doesn't Mr. Harkins, as the principal boss on the West Coast here, usually sit down and in a case like this, for instance, and say, "aabeta company, this is to notify you you are terminated," or words to that effect? Wouldn't that be the way you would usually handle the matter? A. No.

Q. Did Mr. Harkins explain why in a matter of this importance that these plaintiffs shouldn't be called into his office to receive the instructions? Was that discussed?

A. No, that was not discussed.

Q. When you have something disagreeable such as this to discuss with a client, wouldn't that be the usual custom, to have them come to the mountain instead of the mountain going to the customer?

A. No, I wouldn't say that that would be the procedure.

Q. It wasn't in this case at any rate, was it, Mr. [1038] Baymiller? A. No, sir.

Q. Now you three arrived out there, you, Thompson and Ragland arrived out there, and I believe you had to wait about 30 or 35 minutes for Mr. Waldron to get in from wherever he was?

A. We had to wait a short time. I don't recall how long it was. [1039]

(Testimony of Browning Baymiller.)

Q. 20 or 30 minutes, wasn't it? It has been so testified to anyway.

A. Let that testimony stand, then. I don't remember.

Q. All right. What did you talk about with Mr. Lysfjord before Mr. Waldron arrived?

A. We did not talk about this particular subject.

Q. I know. What you really talked about was the acoustical tile job that was installed in the Bell plant at that time, didn't you?

A. In their office?

Q. Yes.

A. Yes, I believe it was discussed, recognizing the tile on the ceiling.

Q. And either you or Thompson or Ragland commented on, "Nice looking job," and so forth, didn't you? A. I believe so.

Q. And you killed time without mentioning a word of the serious matter until Waldron arrived?

A. Naturally.

Q. Then I believe you testified that Thompson immediately said that the Flintkote Company could no longer sell them acoustical tile?

A. That is correct.

Q. And you stated that either Lysfjord or Waldron said—and I am quoting from your testimony—"Do you really [1040] mean that we are no longer a Flintkote customer, that we can no longer buy?" And that Mr. Thompson answered, "That is correct."

Do you recall that testimony?

(Testimony of Browning Baymiller.)

A. Yes, sir, I recall that.

Q. There really wasn't much said about business in Los Angeles other than the fact, a mere statement of it by Thompson? I mean a mere reference to it? There wasn't any prolonged discussion about the do's or don'ts of it, was there? A. No.

Q. And you made another statement that after the meeting was over along toward the end of it in connection with these committed jobs and Flintkote being willing to fill those orders, you tacked onto that answer, "so that they would suffer no financial loss whatsoever by the severance of their relationship."

What did you mean by that?

A. I meant that we would fulfill the requirements of any contracts that they had on hand so that they would not suffer any financial loss due to having bid on Flintkote materials on the commitments that they had out.

Q. I thought that is what you must have meant. You meant they would lose no financial loss on those committed jobs? [1041]

A. We felt that that was all we would be obligated for.

Q. But you didn't mean that they would suffer no financial loss to their business at being terminated, did you?

A. Well, their other activities, for instance, their purchases of other products such as their purchases from E. J. Stanton, we had no connection or no interest in that whatsoever.

(Testimony of Browning Baymiller.)

Q. But, Mr. Baymiller, they hadn't made a purchase from anybody except Flintkote at that time and they didn't know they could at that time, did they? I mean, did they indicate or say anything that led you to believe that they had purchased or could purchase from anybody else at that time?

A. No, they did not.

Q. Well, then—— [1042]

Q. And you didn't mean that——

A. But they must have had other commitments on which they intended to use other products.

Q. You don't—you knew at that time, of course, that they had quit rather lucrative positions to go into this business, didn't you?

A. I had no idea how lucrative their positions were.

Q. You knew they had a regular position?

A. Yes.

Q. You knew that they had committed themselves to warehouses and regular business expenses, establishing two offices?

A. I knew they had committed themselves to the San Bernardino warehouse, but not the Bell warehouse.

Q. But you did at the time you made this statement of financial damage, you were in it? You were in it admiring the acoustical tile in there?

A. I was in it.

Q. Yes. A. I was in the front office.

Q. Yes. You were asked the question by Mr. Black, substantially to this effect: Do you recall

(Testimony of Browning Baymiller.)

either of the plaintiffs stating or any conversation relating to pressure from acoustical tile contractors?

And your answer, similiar to a previous one, said, "I [1043] don't recall the word 'pressure.'" Do you recall that?

A. I recall that question, yes.

Q. Well now, isn't it a fact that Mr. Waldron did, whether he used the word "pressure" or not, state that the compulsion or the force or the persuasion, or something from the acoustical tile contractors, must have been terrific to make Flintkote do this thing? Didn't he voice that thought to you personally, Mr. Baymiller ?

A. No, he did not voice it in that respect to me.

Q. In what respect did he voice it to you?

A. He merely casually mentioned that he had suspicion of a compulsion by other contractors, and I believe Mr. Thompson answered that by saying that that had no bearing whatsoever in determining the severance of this relation.

Q. Isn't it true that you yourself stated to Mr. Waldron, "Yes, there has been pressure"? Do you recall using that?

A. I do not recall making that statement.

Q. Now, Mr. Black asked you, and he used the word "specifically," and I think it is on page 985 of the transcript, Mr. Black, that you were specifically asked:

"Q. Did Mr. Thompson say he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company?"

(Testimony of Browning Baymiller.)

Your answer was, "He could have phrased it in those [1044] words but I do not recall his exact words."

Now, Mr. Baymiller——

Mr. Black: Just a moment. It is hardly fair to ask him that question, without the next one. The whole thing comes in one package here.

Mr. Ackerson: I know you repeated the question, Mr. Black, but I wanted his first answer.

Mr. Black: He is entitled to have his entire answer, I submit.

Mr. Ackerson: Well, I will read the whole thing.

Q. (By Mr. Ackerson): You were asked the question, and I will start on the prior page, Mr. Black—I will have to start ahead of that.

"Q. Do you know whether anything was said by anybody at that meeting about pressure from other contractors?"

That is line 21.

"A. No, sir.

"Q. Is it that you don't recall it or that you state that that did not happen?

"A. I don't recall. I am sure the word 'pressure' was not used.

"Q. Do you recall whether anything was said by you, Mr. Ragland or Mr. Thompson about the matter of authority to make this decision, or higher-ups, or superiors, or anything of that general tenor? [1045]

"A. I do not recall a conversation of that nature.

(Testimony of Browning Baymiller.)

"Q. Specifically did Mr. Thompson say that he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company?

"A. He could have placed it with those words, but I do not recall his exact words.

"Q. Do you have any recollection of anything being said on that score? A. No, sir."

Mr. Ackerson: Is that sufficient, Mr. Black?

Mr. Black: That is all right.

Q. (By Mr. Ackerson): Now, Mr. Baymiller, you do recall, do you not, that the subject was brought up? I think you have so stated today?

A. What subject?

Q. The subject of influence or objection on the part of contractors.

A. In the office—I will tell you in the office there was conversation in the office. Then the two plaintiffs followed us out to the car, when we started to leave, and we had additional conversation out at the curb.

Q. So there may have been conversation, this may have been at the curb?

A. It could have been out there at the curb as we left in the automobile. [1046]

Q. It could have been either place then, is that it, or is it your recollection it happened at the curb?

A. Well, I do not believe it happened in the office.

Q. All right. I just have one or two other questions, Mr. Baymiller.

(Testimony of Browning Baymiller.)

I want to call your attention to this Owens roof job, and I believe you stated your personal knowledge of it was very limited. Anderson came in your office, your own salesman Anderson said they wanted to buy some tile.

You referred them to Howard.

A. I called R. E. Howard and got a price for Anderson to give to Owens.

Q. And gave it to Anderson?

A. Gave it to Anderson.

Q. You never did go out to Mr. Ragland's desk, did you, in connection with the Owens roofing job?

A. No.

Q. You did know, however—or you do know now, at least, that Mr. Ragland took these two plaintiffs or one of them, at least, down and aided them in getting that job?

A. I only know by Mr. Ragland's testimony.

Q. That was the first you heard of it?

A. That was the first I knew of it.

Mr. Ackerson: That is all, Mr. Baymiller.

Mr. Black: That is all. [1047]

(Witness excused.)

Mr. Black: I am going to call a witness out of order, if the court please. I am calling Mr. Hoppe at this time as he has to go East early next week. I would like otherwise to proceed with our own people.

The Court: How long is this case going to last?

Mr. Black: I hope to bring it to a conclusion very soon.

The Court: I understood that it would be at most 10 days. Of course, we are not working four-hour days, which are the conventional court days, but we are working more than half days.

Go ahead with your witness.

I was thinking of the other commitments of the court. If the case is going to take a great deal of time longer we will have to work Saturday or work longer into the afternoon.

ARTHUR D. HOPPE

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated? Your full name, sir?

The Witness: Arthur D. Hoppe.

Direct Examination

By Mr. Black:

Q. What business are you engaged in, Mr. Hoppe? [1048]

A. I am engaged in the lathing and plastering contracting business in this city since 1921. In the acoustical tile application and engineering business since 1937.

In the plastic business for six years until last week. And I operate a ranch near Modesto, California, sir.

(Testimony of Arthur D. Hoppe.)

Q. What company, if any, are you connected with?

A. The A. D. Hoppe Company, the Sound Control Company, that is, the acoustical tile end. Both of those are separate corporations, sir. And the ranch is the Country Royal Rancho.

Q. How long has Sound Control Company been a corporation?

A. I hate to give specific dates, I believe, sir, August 1, 1953.

Q. How was that business conducted prior to its incorporation?

A. That business was then operated as A. D. Hoppe, an individual, doing business as the Sound Control Company, a registered fictitious name.

Q. You were the person in charge of it?

A. I was the sole owner, sir.

Q. Sole owner of it. Was that the situation in the fall of 1951, Mr. Hoppe?

A. That is correct, sir.

Q. Did that continue through until the spring of '52? [1049] A. That is right, sir.

Q. In connection with your acoustical tile business, what line of tile did you handle?

A. From 1937 until the time that I made a connection with The Pioneer-Flintkote I was exclusive distributor for the National Gypsum Company product known as the Gold Bond line, sir. [1050]

Q. And did you continue to carry that tile along with your Flintkote tile when you were carrying Flintkote tile?

(Testimony of Arthur D. Hoppe.)

A. It was specifically understood by the Pioneer people that I was augmenting the National Gypsum line, which was limited in scope as, for instance, if any of the people here understand the acoustical business, we are restricted to tile to only a ¾-inch thickness. There ar many calls for larger sizes and larger thicknesses in tile which they could not furnish and which I could get from the Pioneer-Flintkote people.

Q. How long did you continue to handle Pioneer-Flintkote tile?

A. I handled it—I cannot give you the specific date, sir—I believe it was sometime in late April or May that they came to my office and told me—I do not want to put words in their mouth, sir—but to the effect——

Mr. Ackerson: Your Honor, I am going to object to this. This is hearsay.

Mr. Black: It is what the Flintkote people told him.

Mr. Ackerson: What Flintkote said to Mr. Hoppe is hearsay.

Mr. Black: It is not used in any hearsay sense. It is just to narrate the circumstances under which he ceased operating for the Flintkote people. It seems to me we are entitled to prove that. [1051]

Mr. Ackerson: It is objected to on the ground of hearsay.

The Court: Overruled.

The Witness: Would you repeat the question?

(Testimony of Arthur D. Hoppe.)

Mr. Black: Would you mind reading back the question, Mr. Reporter.

(The record referred to was read by the reporter, as follows:)

"Q. How long did you continue to handle Pioneer-Flintkote tile?

"A. I handled it—I cannot give you the specific date, sir—I believe it was sometime in late April or May that they came to my office and told me—I do not want to put words in their mouth, sir—but to the effect——"

Q. (By Mr. Black): Now will you continue with your answer?

A. To the effect that we were not giving them enough volume to warrant the continuation of our franchise.

I told them that I had spent a good deal of money in developing the tile, having architectural contacts, and so forth, but mine was only a verbal agreement with them. They did permit me to complete some contracts that I had on the books but they felt they could place the business to their better advantage otherwise and I felt I had no [1052] recourse, sir.

Q. During the course of your business operations with Sound Control Company, and specifically in the early part of 1952, did you have any information about the operations of a company called the aabeta company?

A. One of my salesmen—you understand I was

(Testimony of Arthur D. Hoppe.)

not as close to my business, sir, as a lot of employers possibly are, and I possibly should have been—but one of my people came in and said that there is a new firm called—I don't know whether he called it the aabeta company or the aabata company—and, as I recall, I remarked, that isn't unusual, there are 25 or 30.

Q. What, if anything, did you have to do in connection with that aabeta company operation?

A. Nothing whatsoever.

Q. Did you have any discussions following that with the Flintkote people?

A. I do not recall any. Mr. Baymiller testified today that he came to my office. I do not recall that. He may have called on one of my men.

Q. Did you have any discussion with any other Flintkote distributor with respect to the aabeta company's operations?

A. Oh, scuttlebutt, yes, wondering how many applicators we might wind up with.

Q. Did you make any direct complaint to Flintkote with [1053] respect to that?

A. Never in my life.

Mr. Ackerson: Just a moment. I move that that be stricken, your Honor, both the question and the answer, as calling for a conclusion.

The Court: What was the question?

(The record referred to was read by the reporter, as follows:)

(Testimony of Arthur D. Hoppe.)

"Q. Did you make any direct complaint to Flintkote with respect to that?

"A. Never in my life."

Mr. Black: That is exactly what was charged.

Mr. Ackerson: He may state what he said but I submit it is a conclusion. I don't know what Mr. Hoppe may mean by a complaint.

Q. (By Mr. Black): Put it this way: Did you have any communication yourself with the Flintkote people with respect to the operations of the aabeta company in the Los Angeles area?

A. I did not, sir.

Q. Did you attend any meeting of the acoustical tile contractors to protest the operations of the Flintkote people in this area?

A. Are you talking about the acoustical tile contractors association, sir? [1054]

Q. No, I am talking about the Flintkote, the people that handled Flintkote products, the acoustical tile contractors.

A. Mr. R. E. Howard was in my office one day and he said he had heard that there was another company called the aabeta company, whom I had previously heard about from one of my employees, who was figuring tile in the Los Angeles area.

I said I thought they were restricting that to three. I hope they do not get any more.

Q. Did you attend any other meeting other than the meeting just between you and Mr. Howard on that subject? A. No, sir.

Q. At any time?

(Testimony of Arthur D. Hoppe.)

A. I have never been in the Pioneer-Flintkote's office.

Q. Or at any other place? A. No, sir.

Q. Did you ever hear Mr. Howard make any threat to the Flintkote Company to boycott them if the aabeta company would not stop?

A. I did not, sir.

Q. Did you ever make such a statement yourself? A. I did not, sir.

Q. Did you ever hear of Mr. Newport making such a statement? [1055]

A. Only in the courtroom today by innuendo.

Q. At that time you had no knowledge of that statement?

A. Until today I had no knowledge of that statement.

Q. Was your organization engaged at that time in a price-fixing arrangement with other acoustical tile contractors? A. We were not.

Q. Did you have any program for allocating bids among the acoustical tile contractors in this area?

A. I did not.

Q. Did you ever tell The Flintkote Company that such a situation existed?

A. I could not have because such a situation to my knowledge did not exist.

Q. Did you ever ask anyone in The Flintkote Company to agree to discharge the aabeta company from their connections with the Flintkote Company?

Mr. Ackerson: Objected to as a conclusion, your

(Testimony of Arthur D. Hoppe.)

Honor. He ought to state what he said and what they said. I don't know whether he asked for an agreement or not until I know what he said.

The Witness: Will you repeat the question, sir?

The Court: The objection is overruled. But he should state what he said if he did make any such request.

Let's just have the language, if possible; if not, the—— [1056]

Mr. Black: Would you repeat the question, Mr. Reporter?

> (The question referred to was read by the reporter, as follows: "Q. Did you ever ask anyone in The Flintkote Company to agree to discharge the aabeta company form their connections with The Flintkote Company?")

The Witness: I did not.

Q. (By Mr. Black): Did you ever hear any acoustical tile dealer in your presence make such a request of anyone in The Flintkote Company?

A. I did not.

Mr. Black: I believe that is all, Mr. Hoppe.

Mr. Ackerson: Just some very few questions, Mr. Hoppe.

The Witness: Thank you.

Cross-Examination

By Mr. Ackerson:

Q. I just want to get it clear. You handled National Gypsum tile from 1937 to the present date?

A. That is correct.

(Testimony of Arthur D. Hoppe.)

Q. And I take it that that was you main line of tile? A. It was, yes, sir.

Q. And you stated that you used Flintkote only in instances where National Gypsum didn't make the sizes or the [1057] types that you needed, is that right? It was a supplementary line really?

A. It was a supplementary line but in order to endeavor to hang onto the needed line I used a lot of their tile that naturally I needed until I was reprimanded by National and jacked up by these people. They all want volume, all they can get.

Q. But you needed Flintkote only to supplement your National Gypsum line, is that correct?

A. I needed the Flintkote in order to stay competitive in the market, sir, more than a supplementary item.

Q. Very well.

Since you were terminated by Flintkote, have you substituted your requirements that were formerly filled by the Flintkote line or has Nation Gypsum, or at that time had National Gypsum, come into the field to fill out the line?

A. No, they still do not have a full line, and I have to supplement it—we are limited to not bidding jobs that we cannot furnish with National Gypsum tile, or buying it on the market from lumber dealers or other acoustical contractors. Actually at no great premium in price.

Q. Who do you buy it from, Mr. Hoppe?

A. I have bought some material I think from—

(Testimony of Arthur D. Hoppe.)

you understand I am not the detail man in my office——

Q. Do you know actually? [1058]

A. I have bought material from Coast Insulating Company. Largely that is insulating material, not acoustical tile.

Q. And Howard also?

A. I may have bought a few pieces of mineral, a few orders of mineral tile from Mr. Howard, but no fiber tile.

Q. But generally you get it from the acoustical tile contractors who have it, don't you?

A. Or lumber dealers. It isn't a large volume. We just don't bid the jobs that we are not—we go out and sell National where we can.

Q. And if you have a large enough job and National doesn't supply it, you don't bid them, is that what you started to say?

A. Generally speaking, sir, yes. There is a lot of items in a large job that National does furnish. We only have to augment it with small quantities of other material, if that classifies it.

Q. That is the general situation. That is what I wanted, Mr. Hoppe. A. Thank you.

Q. Now, Mr. Hoppe, who is your general manager out at Sound Control?

A. We do not have such a title.

Q. Were you running the business pretty much yourself at that time? [1059]

A. In 1950, '51, I was closer to it than I have been since.

(Testimony of Arthur D. Hoppe.)

Q. How about '52?

A. I lost this account early in '52.

Q. You say it was early in '52 when you lost it?

A. I believe it was in '52 that my franchise was cancelled, sir.

Q. Mr. Hoppe, isn't it a fact that you did talk with either Harkins or Lewis—do you know Mr. Harkins, by the way?

A. I have never met Mr. Harkins.

Q. Have you ever met Mr. Lewis?

A. Not to my knowledge, sir.

Q. How about Mr. Thompson?

A. I met Mr. Thompson outside in the hall today.

Q. Mr. Thompson you know is general sales manager for Flintkote?

A. I am sorry, sir. I did not know that until this moment, if that is a fact.

Q. Do you know Mr. Baymiller?

A. Yes, I know Mr. Baymiller.

Q. You have know him for a long time, haven't you? A. Since about 1950, '51.

Q. And back in '51 or '52, I assume you knew Mr. Ragland? He was the salesman? [1060]

A. Not well. He was in my office a few times.

Q. He came to your office?

A. Bear in mind that I also was operating in Whittier and was not in my office at times when sales personnel would call.

Q. That is what I asked on the previous question. Who was in your office when you weren't there? Who carried on the busines for you?

(Testimony of Arthur D. Hoppe.)

A. Whichever of the salesmen were in or else messages are left with one of the girls in the office, sir.

Q. Now I am going to ask you the question, Mr. Hoppe: Isn't it a fact that to one representative of Flintkote you threatened to cancel the line in view of these people engaging in business in Los Angeles?

A. I did not, sir. [1061]

Q. You stated that Mr. Howard came over to your place of business and advised you of—I believe you said one of your employees advised you they were doing business, the plaintiffs were doing business in Los Angeles? Was that your testimony?

A. That is correct.

Q. Then subsequently Mr. Howard spoke to you about it?

A. Mr. Howard dropped by my office, I believe. My office, sir, is on Riverside Drive. Mr. Howard's was way across town. He had been in the Valley and dropped by my office. He used to be a lather and he worked on plastering jobs for me. We were good friends.

He dropped by my office and said he understood this new aabeta outfit, had I heard of them.

I said yes. But until today I have not had the pleasure of metting either one of them, sir.

He said he understood they were figuring Pioneer-Flintkote.

I said, "Gee, I thought there were only three of us. I hope they don't scatter it to the winds," or words to that effect.

(Testimony of Arthur D. Hoppe.)

Q. Is it a fact, though, isn't it, neither of you were very happy about having another competitor in the area, were you?

A. We never welcome—we have enough without welcoming [1062] it sir. They come in whether they are welcome or not.

Q. These people didn't stay in very long, Mr. Hoppe.

Mr. Hoppe, you stated that you had never attended meetings of acustical tile contractors relative to price-fixing or allocation.

A. I never did, sir.

Q. Did you ever send a representative to such a meeting? A. I did not, sir.

Q. Never? A. Never.

Q. Never from 1950 to date?

A. Not to date did I ever send a man to any price-fixing meeting of any nature, and I have not since I was in business since 1921.

Q. Is there any way The Flintkote Company could base a bid on a Sound Control figure, without having been supplied that Sound Control figure in advance of the bid?

Mr. Black: Just a moment. That question is—was that, is there any way that Flintkote could——

Mr. Ackerson: Does he know any way.

Mr. Black: Flintkote?

The Court: The question called for a conclusion.

Mr. Black: Flintkote is bidding? Is that the question?

Mr. Ackerson: I beg your pardon?

(Testimony of Arthur D. Hoppe.)

Mr. Black: I just don't—— [1063]

Mr. Ackerson: I beg your pardon.

The Court: Well, we will try again after recess.

Mr. Ackerson: Let's try it again.

(Short recess taken.) [1064]

Mr. Black: Resume the stand, Mr. Hoppe.

A. D. HOPPE

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Ackerson:

Q. Mr. Hoppe, you have an entertainment room in the bottom of your home, don't you, like a rumpus room? A. Yes, sir.

Q. Isn't that affectionately known as Hoppe's cellar?

A. I have never heard it called by that name in my life, sir.

Q. I thought maybe you named it that, Mr. Hoppe.

You stated just before the recess that you had never attended, or did you say you had never known, of a meeting of acoustical contractors in which prices were discussed?

A. Oh, no, sir.

Q. You didn't say that?

(Testimony of Arthur D. Hoppe.)

A. Oh, no. No, I said at which price fixing was arranged. There is a world of difference between discussing prices and fixing prices, sir.

Q. But you have attended meetings, I take it, where prices were discussed, then, as distinguished from fixing prices, in your mind?

A. Oh, yes. You can't have two contractors together in [1065] any line of business where prices are not discussed, and mostly cussed and discussed, sir.

Q. And then you have attended meetings I assume of acoustical contractors?

A. I have attended many meetings where acoustical contractors were there, yes.

Q. They were acoustical contractors' meetings, I mean.

A. Yes, I have attended many meetings of the acoustical contractors' association, not many but several.

Q. And at some of these meetings you discussed prices, is that right?

A. I think mostly before and after meetings prices were—as I say, you can't get contractors together without discussing prices. For me to say I didn't discuss prices would be absurd, sir.

Q. What was the general purpose of these contractors' meetings, Mr. Hoppe?

A. The contractors' meetings were held—I think the minutes of the contractors' association are open to you, sir—they were made primarily to be as strong a front as possible to labor and negotiations

(Testimony of Arthur D. Hoppe.)

and I believe, sir, at the request of the negotiating bodies. They wanted us to be in a group rather than to deal with us as individuals, sir.

Q. You say that was the main purpose?

A. That was the main and, as far as I know, the primary [1066] purpose. It is a non-profit corporation, sir.

Q. Yes. But you stated at these meetings prices were discussed, didn't you?

A. I didn't state specifically they were discussed. I said that I can't imagine a meeting of contractors where prices are not discussed.

Q. Then I will ask you the direct question: Were they discussed, were prices discussed?

A. They couldn't have been—I can answer that now directly—I can tell you that I think probably they were. I just can't imagine a meeting of contractors where prices did not come into the discussion.

Q. Yes. Now do you recall——

A. Whether there are two or 20, sir.

Q. Yes. And do you recall, Mr. Hoppe, when you didn't attend these meetings you had a representative attend these contractors' meetings?

A. No, sir.

Q. Did you ever have Mr. Smith, who brought the documents up the other day, attend those meetings? A. Not to my knowledge, sir.

Q. You don't know that he ever attended one?

A. I do not, sir.

Q. Do you recall——

(Testimony of Arthur D. Hoppe.)

A. Now I don't say that he didn't, I say if he did I [1067] didn't know it.

Q. I understand. A. Thank you.

Q. You stated, I believe, that you ceased handling Flintkote tile somewhere the first part of '52, and with that date in mind, and only for the purpose of using the date, do you recall a meeting of representatives of acoustical tile contractors held in your home in this amusement room?

A. We might have had an association meeting in my room. In fact, I think we did. We met at various homes.

Q. You had one about that time, do you recall?

A. I do not recall.

Q. But you do recall having them in your home?

A. I have had some, or several at home. I do not recall a stated meeting. That could or could not have been.

Q. Do you recall along about that time that a Mr. Granni used to attend those meetings for Acoustics, Inc. ?

A. I do not recall Mr. Granni ever attending a meeting in my home. Is that the question?

Q. Yes. Let's limit it to these meetings in your home.

A. I do not recall of his being there, sir.

Q. Do you recall a Mr. Howard—and I think they used to refer to him by the nickname of Bugs Howard—do you know who that is?

A. I never heard of a Mr. Bugs Howard to my knowledge. [1068]

(Testimony of Arthur D. Hoppe.)

Q. Did you ever hear of a Mr. Howard representing the Coast Insulating Products Company?

A. No, sir. [1069]

Q. Did you ever recall his being in your home at one of these meetings? A. No, sir.

Q. How about a Mr. Anthony Wellman, who was then in '52 representing the R. E. Howard Company, was he ever in your home at one of those meetings? A. Not to my knowledge.

Q. How about Mr. Bill Arthur, was he ever in your home?

A. Mr. Bill Arthur—now you are getting—Mr. Bill Arthur was employed by me. I cannot tell you the year, and he was in my home divers times.

Q. At one of those meetings?

A. Not that I recall.

Q. Mr. Bill Arthur worked for Shugart at the time I am talking about, in '52, I believe.

A. As to that, I couldn't testify as to the time he worked for the Shugart Company, sir.

Q. Was he in your home? You stated he has never been in your home at one of those meetings?

A. Not to my knowledge.

Q. How about Mr. Arnett of the Downer Company?

A. Yes, I believe he used to represent the R. W. Downer Company at some of those meetings after the senior Mr. Downer died. I can't give you the date, sir.

Q. Did he attend any of these meetings, in your home? [1070]

(Testimony of Arthur D. Hoppe.)

A. You speak as though there were many meetings. He attended a meeting, yes. I think I recall his being there.

Q. A meeting. How about Mr. Smith of your company? You stated he did attend those meetings?

A. I stated he did not attend meetings if I were there. He certainly wasn't there if I were there. There would be no need for us both to be there.

Q. He didn't attend any meeting in your home?

A. There was no meeting at my home unless I attended, sir.

Q. How about Mr. Gustav Krause of Coast Company?

A. Yes, Mr. Krause has been in my home, both at and not at meetings.

Q. You don't recall whether he attended this meeting—did you hold these meetings somewhere around '52 and '51?

A. I cannot give you dates, sir.

Q. You probably——

A. I would say possibly in that span of '51, '50, '51, '52, there was probably a meeting of the group at my house, yes, sir. But I wouldn't want to swear to that.

Q. Well, very well. The best of your recollection—— A. Yes.

Q. ——that is right? A. Yes.

Q. Did you attend any of the meetings at a time when [1071] a Mr. Hollenback or Hollenbeck was there officiating or attending the contractors' meet-

(Testimony of Arthur D. Hoppe.)

ing? It was before the incorporation of the Association back in '51 or '50. Did you attend any of those dinner meetings?

A. With Mr. Hollenbeck? No, sir.

Q. He was an estimator, if it will help you. I think he was reviewing estimates.

A. I recall there was some sort of—in the meetings of the Association discussions came up about a wide diversity in the footage of figures.

As I recall, Mr. Hollenbeck worked with other groups in quantity survey work and for a short time he was—I can't tell you how long—some of the sales engineers of the various companies, nor can I tell you whom from my company went, sir, attended a few meetings where they took off on sample jobs, as to how many feet they would get and how you would do it and how you would set it up in an attempt to equalize quantities, takeoffs. Do I make myself clear, sir?

Q. I think so. Wasn't it true, Mr. Hoppe, that a part of Mr. Hollenbeck's duties was to determine, after looking at the contractor's actual bid on a job, who was low, who was next and who was next, and make the decision on the basis of quantity takeoffs, who was actually low bidder and who was second low bidder? [1072]

A. If that is true, it was without my knowledge and consent, and I wouldn't have any part of it.

Q. You don't know that that was done.

A. I wouldn't say it wasn't done, it couldn't

(Testimony of Arthur D. Hoppe.)

have been done without my knowledge, I don't think, and I would have no part of it, sir.

Q. Would you say, to your knowledge, Mr. Hollenbeck, as a duty with the group, did not disqualify the low bidder and award the job to what he deceided was the second low bidder?

A. I know nothing of anything of that nature nor would I have had any part of it. If I am low on a bid, Mister, I want it.

Q. I am going to see if I can ask a question I started to before recess, Mr. Hoppe, without mixing the thing up.

I started to ask you, if, as an acoustical tile man, you knew of any way in which, say, the R. W. Downer Company could base its bid on a particular job on the figures bid by Sound Control, without Sound Control first supplying that bid to Coast.

Do you follow me?

A. Will you ask me one specific question, sir, and I will attempt to answer it.

Q. Did you ever supply the bid figure for Sound Control to the Downer Company in advance of the awarding of the bid?

A. I never supplied any competitor with any of my [1073] figures prior to the awarding of a bid.

Q. Does that statement go to your employees?

A. That I cannot say, sir.

Q. You don't know whether your office——

A. If they had done that they would no longer be employees, sir.

(Testimony of Arthur D. Hoppe.)

Q. Your statement is then that you know nothing about it?

A. I know nothing about it.

Q. We have had some documents here introduced for identification, and it has been testified that this bid under a bid allocation scheme in effect at the time, in 1951, was alloted to Sound Control.

Now, we turn over here and this is the way the testimony said it was alloted:

They said that these were your figures in pencil here, 74.48, 8.59, 197.42.

That those figures were supplied to Downer and that Downer, who was not supposed to get the bid, automatically raised their figures to, 74.48 to 78.51, and so forth down the line, so that the allotment of the job to you would fall to you without any competition.

Do you know anything about such a scheme?

A. I know absolutely nothing about it and those are not my figures. [1074]

Q. You mean you didn't write them?

A. You said those are your figures, and I say they are not my figures.

Q. You mean you did not write them.

A. I did not write them and I know nothing of them.

Q. Do you know anything of the job from memory now? Do you know whether you got the Lakeview School job?

A. I do not know from memory if I did. If I

(Testimony of Arthur D. Hoppe.)

did and it has been testified I did, it is probable we did. I couldn't tell you the names of the jobs we did.

Q. Sometimes the best laid plans go awry. It has been testified you were supposed to get it.

You know nothing about it?

A. I know absolutely nothing about it.

Q. Who else in your office would know something about it? A. I don't know.

Q. Something about matters of that kind.

A. To my knowledge they would know nothing about it.

Q. Do you know Mr. Ollie Granni personally?

A. Yes.

Q. Do you know Howard of Coast at this time, '50? A. I don't know Mr. Howard of Coast.

Q. You know Tony Wellman?

A. Tony Wellman, I believe, is an estimator, freelance, [1075] I believe.

Q. I believe you stated Bill Arthur used to work for you. You know Mr. Arthur? A. Yes.

Q. Do you know Mr. Arnett? A. Yes.

Q. Mr. Smith, who works for you?

A. Yes.

Q. You are well acquainted with Mr. Krause?

A. Yes. [1076]

Mr. Black: Thank you, Mr. Hoppe.

We will call Mr. Thompson next, if the court please.

Mr. Hoppe: Your Honor, may I now leave the courtroom?

(Testimony of Arthur D. Hoppe.)

The Court: Does anyone wish this witness any further?

Mr. Black: Not as far as I am concerned.

Mr. Ackerson: He may be excused.

The Court: Apparently not. You may go, Mr. Hoppe. Thank you for coming in.

E. F. THOMPSON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: E. F. Thompson.

Direct Examination

By Mr. Black:

Q. What is your present occupation, Mr. Thompson?

A. I am the sales manager for the Southwest District, the Pioneer Division of the Flintkote Company covering building materials.

Q. How long have you held that position?

A. Since October, 1946.

Q. Have you held it continuously from that time to the present? A. Yes, sir.

Q. Then I take it you were acting in that capacity for [1077] the Flintkote Company during the period commencing in the summer of 1951 and running into the spring of 1952? A. Yes.

Q. And you have been more or less continuously at the Flintkote office during that period?

(Testimony of E. F. Thompson.)

A. Yes.

Q. When did you first hear of the plaintiffs?

A. I first heard of them during the summer or fall of 1951, I believe it was.

Q. And were their names brought to you in the ordinary course of your business?

A. They were brought to me by Mr. Ragland and Mr. Baymiller as prospective customers.

Q. What, if anything, was suggested by either of those gentlemen in connection with the plaintiffs that you could do?

A. Well, in general, they were mentioned as possible customers in the application of acoustical tile and they wished to go into that business and use our material.

Q. Was anything said to you with respect to arranging an appointment with you to interview these people?

A. Yes. After preliminary talks by Mr. Ragland and Mr. Baymiller I was asked to talk to them.

Q. And was such a meeting arranged?

A. Yes. [1078]

Q. Where did you first meet them, Mr. Thompson?

A. I believe the first time I met them was at the Manhattan Supper Club at lunch.

Q. Can you place the time of that meeting?

A. Well, it would be in the fall of 1951. I can't give you even the month.

Q. Who was present?

(Testimony of E. F. Thompson.)

A. Mr. Baymiller, Mr. Ragland, the two plaintiffs and myself.

Q. Mr. Thompson, we have been through this story with other witnesses a good many times, but I will repeat the same admonition to you. I am about to ask you for the substance of the conversation that was had at that meeting. Please, so far as possible, give the substance of what was said in contradistinction to conclusions about the net result or effect or purpose of the conversation, realizing that at this date I can hardly expect you to reproduce word by word what was said.

Please tell, according to your best recollection, what was said at that meeting, who said it and who replied to it as best you can give it from your own recollection.

A. Well, I would like to preface it in this way: I was there to determine the possibility of selling material to these gentlemen, and therefore I asked them for the following information: [1079]

First, to determine their ability to perform contracts using our material. I asked them directly if they had been in that business, and for how long.

They told me the number of years involved.

They also told me the type of work that they had performed in the past.

They brought some designs, as I remember it, to prove their ability, which was acceptable so far as I know.

I inquired actually into their financial ability to perform contracts.

(Testimony of E. F. Thompson.)

That in substance was the purpose and the way the meeting developed.

Q. Was there any discussion that you can recall with respect to territories in which this proposed operation was to take place?

A. Well, there were various territories discussed, and I recommended that this venture be established in the San Bernardino-Riverside area primarily because I needed more Flintkote Company distribution in that area. Also that it appeared to be a territory in which there was enough business to support a contractor of that type.

Q. Was anything said according to your recollection about operating in the Los Angeles metropolitan area? A. Yes.

Q. What was said and by whom? [1080]

A. The question put, as I remember it, was that the——

Q. Who put the question, if you know?

A. Well, probably one of the plaintiffs. I don't know which one. I would say that one of them asked, what could be done if they secured a contract in the Los Angeles area. And my answer was that it could not be handled except under special arrangement which would have to be worked out if such a thing was brought up, that we could not accept additional contractors and representation in the Los Angeles area.

Q. Do you recall whether anything was said at that meeting with respect to hauling materials into the Los Angeles area from some other point?

(Testimony of E. F. Thompson.)

A. I don't remember anything of that nature.

Q. Do you recall any discussion at that meeting, Mr. Thompson, about potential clients by other applicators? A. No, I don't.

Q. Do you recall Mr. Waldron stating that the dealers were organized, that they weren't competing with each other any more?

A. I have never heard of such a thing. [1081]

Q. I take it your answer is that——

A. No, I have not.

Q. Mr. Waldron did not make such a statement?

A. I don't remember his making a statement like that.

Q. Was there any discussion about pressure from other acoustical dealers at that meeting?

A. Not that I recall, no.

Q. Do you recall anything with respect to Flintkote not being or being intimidated by pressure or coercion?

A. I don't remember anything of that discussed.

Q. Is there anything else at that meeting I have not covered that you now recall that has a bearing on this operation by the plaintiffs?

A. Well, I could tell you my own ideas, if that would—

Q. If it is your idea of what is your recollection.

A. Yes. I was favorably impressed with the gentlemen, as to their ability and their apparent willingness to operate in the outside area, San Bernardino-Riverside area, and also it was discussed the possibility of their operating in Las Vegas,

(Testimony of E. F. Thompson.)

Nevada. We proposed that they solicit business there, where we had no representation.

But other than that, and asking for a financial statement, and telling them that we would arrange further discussions with Mr. Harkins, that is the highlight of the meeting, or the total. [1082]

Q. What was your next contact with the plaintiffs or either of them following the meeting at the Manhattan Supper Club?

A. The next talk I had with them—the next time I saw them was when they came to our office to talk to Mr. Harkins.

Q. Did you personally see them at that time?

A. Yes.

Q. What did you do on that occasion?

A. I took them into Mr. Harkins' office and introduced them, and sat down with them.

Q. Can you recall what was said at that meeting by Mr. Harkins or by you or by the plaintiff?

A. Well, I repeated to Mr. Harkins my conversation with him prior to that time, that I had talked to these people and that they were willing to start a venture in the Riverside-San Bernardino area. That we needed representation in that area, and I felt they were capable of looking after a small territory and they were to bring a financial statement with them, and I would like his consideration.

Q. What did Mr. Harkins state at that meeting?

A. Mr. Harkins asked the gentlemen if they had

(Testimony of E. F. Thompson.)

made a survey of the territory which they said they had.

He asked them if they had good reason to believe their venture would be successful. They said they felt it would be. [1083] But there was a great deal of business in that area that could be handled locally, rather than importing applicators of acoustical tile from the Los Angeles area.

The felt, in operating there, they could make enough money in their venture to make it worthwhile.

He gave them some good sound business advice as to collections and so on. It was rather a short meeting, I would say, lasted a half hour.

Q. Do you recall anything else significant that was said, that you haven't told about, at that meeting? A. No, sir, I don't.

Q. What happened after that meeting broke up?

A. After that meeting broke up Mr. Ragland took the plaintiffs in to see Mr. McAdow, our credit manager, to present their financial statement, and I returned to my office and didn't see them again.

Q. Did you next, or, when did you next have anything to do with respect to the plaintiffs?

A. The next time I had anything to do with them was when I attended, or when I went to the termination meeting.

Q. Prior to that, did you have any office conference on the subject?

A. Yes. After it had been determined that they were in business in the Los Angeles area, we dis-

(Testimony of E. F. Thompson.)

cussed it with Mr. Baymiller and Mr. Ragland, and Mr. Harkins. [1084]

Q. Was that the first information you had had they were doing business in the Los Angeles area?

A. Well, it was reported to me by Mr. Baymiller that was the case.

Q. Prior to that you had no personal knowledge?

A. I had no personal knowledge of it.

Q. Did you have any contacts with the acoustical tile contractors at that time, prior to the termination meeting? A. No, sir, I did not.

Q. You didn't talk to or telephone any of them?

A. No, sir.

Q. Did any of them come to the Flintkote office while you were there? A. Not that I know of.

Q. Were you there nearly every day during that period? A. Oh, yes.

Q. Did you hear of any threats of boycott of the Flintkote Company by other acoustical tile contractors—— A. No, sir.

Q. ——if these plaintiffs were allowed to continue in operation? A. No, sir.

Q. Did you hear of any meeting of the acoustical tile contractors about that time, dealing with the subject? A. No, I did not. [1085]

Q. Who made the decision with respect to terminating your relations with the plaintiffs?

A. Well, Mr. Harkins and myself, with Mr. Baymiller and Mr. Ragland, discussed the situation very thoroughly, and I believe Mr. Harkins decided

(Testimony of E. F. Thompson.)

that the understanding must be terminated, and we agreed with that decision.

Q. Did you volunteer to do this job or were you asked to do it?

A. Well, it was my duty to do it. I wasn't—there was no special request.

Q. Did you select persons who would accompany you on this mission? A. Yes.

Q. How was that meeting arranged, if you know?

A. I believe Mr. Ragland made the appointment.

Q. And then did you proceed with the other two direct to the Bell office? A. Yes.

Q. Whom did you find there when you arrived?

A. One of the people that we wished to see. I don't know one from the other. One of them was there and the other came in shortly afterwards.

Q. After the second plaintiff arrived, how many were there.

A. There were five of us. [1086]

Q. And that is all? A. Yes, sir.

Q. What was said at that meeting, as nearly as you can recall?

A. Well, we didn't waste any time. I told the plaintiffs that we felt, we understood—we knew actually that the understanding which we had had with them, regarding their operation, had been violated.

That we could not go along with a program of that kind. That we felt we must terminate any arrangement we might have had with them at once.

(Testimony of E. F. Thompson.)

Q. What was said by either of the plaintiffs in response to that, Mr. Thompson?

A. They sought to clarify it, as to whether I meant——

Mr. Ackerson: I object to the opinion, your Honor.

Q. (By Mr. Black): Please state, as nearly as you can, the substance of what they said.

A. They asked me if that included the entire understanding, or whether just for the Los Angeles area.

In other words, if they returned to do business in San Bernardino would we continue to sell them, and in answer to that I said we would not. [1087]

Q. Was anything said at that meeting with respect to filling contracts which he plaintiffs may have had made for installations in this area?

A. Yes. That decision was made before we went to call on the gentleman. Mr. Harkins said that we might accept any orders for material covering contracts which they had executed and also for any material covering contracts which they may receive within a reasonable length of time, that we could fill those orders covering the contracts.

Q. Do you recall anything else that was said at that meeting?

A. Nothing of note, no. It has been several years. I don't think of anything of importance.

Q. Do you recall whether anything was said at that meeting in connection with pressure from other acoustical tile contractors?

(Testimony of E. F. Thompson.)

A. I was asked I believe if that was the reason for the termination, and I replied that it was not.

Q. Do you have any knowledge or did you at that time have any knowledge of any arrangement between the acoustical tile contractors for fixing prices or allocating bids? A. No, sir.

Q. Did you have any knowledge or notice of any meeting of the acoustical tile contractors in which a Flintkote representative was present with respect to discharging the [1088] plaintiffs from their relationship with Flintkote? A. No, sir.

Q. Did you ever hear of any threat by a Mr. Newport with respect to spending $40,000 or $50,000 to boycott Flintkote if they did not discharge the plaintiffs? A. No, sir.

Q. Did you have any later connection after this termination meeting with either of the plaintiffs personally? A. No, I did not.

Mr. Black: I believe that is all. You may cross-examine.

Mr. Ackerson: I have just a few questions.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Thompson, did Mr. Ragland accompany you into Mr. Harkins' office when you introduced the plaintiffs to Mr. Harkins?

A. I think he did. Yes, I am sure he did.

Q. You are sure he did? A. Yes.

Q. Did he stay there all the time at the meeting?

A. That I don't know.

(Testimony of E. F. Thompson.)

Q. Did you stay there all the time?

A. I stayed there all the time.

Q. Well, then, I want to ask you a few [1089] additional questions as to what may have happened.

Do you recall Mr. Harkins wishing them well, sort of related how he had worked his way up to be chief in the Flintkote Company?

A. No, sir. Mr. Harkins didn't work his way up to be chief in the Flintkote Company.

Q. No, but he told how he had started low and worked high?

A. Maybe his life's history, perhaps.

Q. Yes. He did go into that, didn't he?

A. He could have said something of that kind. I don't recall.

Q. I want you to think seriously about this question, Mr. Thompson: Didn't Mr. Harkins refer to the Convair roofing job out near Pomona during that meeting? A. No.

Q. You say no? A. No, sir.

Q. Didn't Mr. Harkins tell these two gentlemen at that time, the two plaintiffs, that Flintkote had sold the roofing there for that job, that it was a big job, and that there was some acoustical tile in it, that they should go after it?

A. No, I don't believe he did.

Q. Did he say any of those things? [1090]

A. I don't believe that that came up for discussion.

Q. Your recollection is that the Convair job was never mentioned? A. That is right.

(Testimony of E. F. Thompson.)

Q. You know about the Convair job, don't you, Mr. Thompson? A. Yes, sir, very well.

Q. You sold about a million and a half feet of roofing on that job, didn't you?

A. I don't remember the quantity. It was a large quantity.

Q. It was large enough so that you had Jim Marlowe, your architectural adviser, out there advising on the installation, didn't you?

A. Probably not.

Q. Do you know what roofing company you sold that to, sold the roofing material?

A. We sold roofing there through one of our distributors to two roofing companies. One was the Associated Roof Company and the other was the Acme Maintenance Company, I believe.

Q. Yes. The Associated was one.

A. They had two companies operating on that job.

Q. So that you state Mr. Harkins made no mention of any of those subjects concerning the Convair roofing job? [1091]

A. I don't recall that he mentioned that, no.

Q. You don't recall, is that the answer?

A. That is right. That is my answer.

Q. But you have stated the facts purported to have been related are true, that Flintkote did sell the job? A. I am quite sure they did.

Mr. Ackerson: That is all.

Mr. Black: Thank you, Mr. Thompson.

(Witness excused.)

Mr. Black: Call Mr. Lewis.

SIDNEY M. LEWIS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Sidney M. Lewis.

Direct Examination

By Mr. Black:

Q. What is your position or occupation, Mr. Lewis?

A. I am assistant sales manager to the building materials division of the Pioneer Division of the Flintkote Company.

Q. What is your relationship with Mr. Harkins, or was when Mr. Harkins was with the company, and Mr. Thompson?

A. I was Mr. Harkins' assistant. [1092]

Q. And did you have that position in the summer of 1951? A. I did.

Q. Did you continue to occupy it until about the summer of '52? A. I did.

Q. In that capacity do you remain most of the time at the Flintkote office or do you go out traveling? A. I am in most of the time.

Q. What exactly are your duties in that capacity?

A. Well, in an administrative way I am involved in all of the policy functions which involve the operation of the sales department.

(Testimony of Sidney M. Lewis.)

Q. In that connection, is it part of your duties to be familiar with the volume of the acoustical tile sold in the Los Angeles area to your distributors?

A. I know because of the nature of my work I am familiar with the volume that we sell, yes.

(Exhibiting document to counsel.) [1093]

Mr. Black: I will ask this be marked for identification.

The Clerk: Defendants' Exhibit J for identification.

(The exhibit referred to was marked Defendants' Exhibit J for identification.)

Q. (By Mr. Black): Mr. Lewis, I show you a tabulation of certain figures which you have handed to me and which we have marked for identification, and I will ask you to state what that represents.

A. These figures represent sales of acoustical tile which we made and sold to the three accounts to whom we were selling acoustical tile during the years 1951, '52, and '53 and '54. They are taken from our records, which we tabulate at the end of each year, showing sales to all of our customers on all of our building materials.

Q. There are three columns marked "Acoustics, Coast, and Howard," and on another sheet is marked "Sound Control." A. That is right.

Q. Do you recall when Sound Control was operating as a Flintkote customer, as respects acoustics?

(Testimony of Sidney M. Lewis.)

A. As I recall, it was in April of '51. My memory—I am not positive on that.

It was early, I think, '51.

Q. That what happened?

A. That we felt that with volume of acoustical sales [1094] by Sound Control—that the volume was not as great as it might have been and that our company's interest could best be served by placing our business in the hands of another contractor.

Q. Well, looking at that Sound Control figure, Mr. Lewis, are you sure that '51 date is accurate?

A. No, I guess it isn't. It is '52.

Q. That is the other testimony in the case.

A. That is correct. These figures indicate it was early in '52.

Q. Now, will you kindly read into the record the figures for 1951 and 1952 for the respective accounts, just those two years, for the moment.

A. '51 and '52?

Q. Yes, sir. Please read them slowly, so we can understand them.

A. The year 1951, sales to Acoustics, Inc., were $35,348.61.

For Coast Insulating Products, $51,816.54.

R. E. Howard, $53,015.98.

For the year 1952, Sound Control, $3,590.72.

Acoustics, Inc., $63,640.94.

Coast Insulating Products, $58,733.99.

R. E. Howard, $49,755.96.

Mr. Black: I will offer this in evidence, if the Court [1095] please, as our next exhibit in order.

(Testimony of Sidney M. Lewis.)

The Court: Received.

(The document referred to was received in evidence and marked as Defendants' Exhibit J.)

Q. (By Mr. Black): At that time, the period '51-'52, were those the only acoustical tile contractors selling your products in the Los Angeles area, apart from the plaintiffs' operations?

A. That is right.

Q. Did you have anything personally to do with the arrangements with the plaintiffs in thic case?

A. No.

Q. Did you see them in the office before they were taken on as acoustical tile accounts?

A. I saw them enter Mr. Harkins' office at the time that the final arrangements were made.

The discussion which Mr. Thompson described as being held in Mr. Harkins' office.

Q. Were you introduced to them at that time?

A. No.

Q. Did you ever actually meet them personally?

A. No.

Q. What, if anything, was the first occasion for you to take any action with respect to these plaintiffs in connection with your duties at Flintkote company? [1096]

A. Well, I, handling most of the inside work when the order was placed, I probably had something to do with the handling of the order then, because I have charge of the clerical personnel in

(Testimony of Sidney M. Lewis.)

the office where orders are entered and sent to our mill at Hilo, Hawaii, for shipment to our customers.

I probably saw the order when it was first placed and had to do with the shipment.

Q. Do you remember seeing that document?

A. No.

Q. Do you have any recollection of any address on it?

Mr. Ackerson: He never saw it. I object to——

Mr. Black: He said he probably received the order. He actually doesn't recall.

The Witness: No, I don't recall the order, specifically the order, no.

Q. (By Mr. Black): What next did you have to do in connection with the plaintiffs in respect of your duties at the Flintkote Company?

A. Well, the next activity in which I was involved was a telephone call from Mr. Krause.

Q. About when did that occur?

A. As I recall, it was in the first or second week of February.

Q. Who is Mr. Krause? [1097]

A. Mr. Krause was, I guess, sales manager—he is associated with, was then and still is, I believe, associated with Coast Insulating Products as the sales manager.

Q. Did he call you or you call him?

A. He called me.

Q. What was said on that occasion?

A. As my recollection goes, Mr. Krause called

(Testimony of Sidney M. Lewis.)

me and said the plaintiffs had, were doing business in the city of Los Angeles, and requested that action be taken to correct the situation because, as he understood it, the customers we had had previously were all he felt we wanted in the city of Los Angeles. [1098]

Q. Was Mr. Krause rather emphatic on that occasion? A. Decidedly so.

Q. What did you say to Mr. Krause?

A. I told Mr. Krause that we would investigate the actions of the plaintiffs, that it was my understanding, as it was his, that the activities would be confined to the San Bernardino-Riverside area, that the action our company would take would be based upon our own investigation of the facts, that we wanted to act fairly and squarely as we would in the case of him, and that we would investigate and let him know what proper action the company would take.

Q. Was anything more said that you remember?

A. Well, he was insistant that action be taken immediately, and I said that inasmuch as the individuals who had made the direct arrangements were not available at the moment that when we had time to make a thorough investigation we would take the proper action.

Q. Who was absent at the time?

A. As I recall, Mr. Ragland was in the Northwest, whether it was in Seattle or Portland, he was in one of those towns, and Mr. Harkins was out of town. I thought he was in San Francisco,

(Testimony of Sidney M. Lewis.)

but that may not have been the case. He was not in the office.

Q. Did you have any other contact with the acoustical tile contractors about aabeta's [1099] activities?

A. No, except I believe in the course of the conversations with Mr. Krause there might have been two or three on that day or the two days, that he told me that the other of our customers were exercised and upset, and that inasmuch as it would take several days to investigate the facts, why I suggested to Mr. Baymiller, Mr. Ragland was out of town, Mr. Baymiller and Mr. Heller, that they explain to our other customers that we wanted to investigate the facts fully, that we wanted to take what action was right, and suggested that they make a call on the other of our two customers to whom I had not talked and explain that we had been advised that aabeta was doing business in Los Angeles and to investigate the facts fully and would advise them as soon as we found what the facts were.

Q. Did you attend any meeting of the acoustical tile contractors? A. No, sir.

Q. To the best of your knowledge was there such a meeting?

A. I know of no such thing.

Q. Did you ever hear of any threats against Flintkote to boycott the Flintkote Company if they did not discharge these plaintiffs?

A. At no time.

(Testimony of Sidney M. Lewis.)

Q. Did you ever hear of a remark by Mr. Newport that [1100] he would spend $40,000 or $50,000 to see to it that not another foot of tile was sold by Flintkote if they didn't discharge the plaintiffs?

A. I recall no such remark.

Q. Did any of these people at any time during this period come to the Flintkote office?

A. At no time.

Q. Did you call on any of them personally?

A. I did not.

Q. Do you know anything about a bid allocation scheme among the acoustical tile contractors about this time in the Los Angeles area?

A. None whatsoever.

Q. Or any plan for fixing prices?

A. None.

Mr. Black: That is all. You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Now you have related everything, Mr. Lewis, that you recall that you had anything to do with in connection with the plaintiffs, you personally? You can think of nothing more?

A. Nothing more.

Q. Did you have a conversation with Mr. Hoppe over the phone or otherwise in connection with these people doing [1101] business?

A. Not that I recall.

(Testimony of Sidney M. Lewis.)

Q. Did you hear about such conversation with Mr. Harkins or Mr. Baymiller?

A. With Mr. Hoppe?

Q. Yes.

A. I recall no such conversation. It may have happened.

Q. You heard of no contact by Mr. Hoppe with Flintkote during this period?

A. I don't recall any, no. I don't say it didn't happen, because he may have talked to Mr. Harkins and I may not have known it.

Q. Was it ever brought to your attention that Mr. Hoppe did object strenuously other than through Mr. Krause?

A. No, only through Mr. Krause.

Q. But Mr. Hoppe did cease handling Flintkote, you state, the first part of 1952?

A. That is correct.

Q. You stated that when Mr. Krause called you in his emphatic way he objected very strenuously and he wanted immediate action, is that right?

A. That is correct.

Q. And I thought I understood you to say, because it was his understanding that there weren't to be but three [1102] Flintkote dealers in the area. Was that about the gist of it?

A. That is right.

Q. You don't know of any prior discussions with Mr. Krause, do you, as to whether or not you should give these plaintiffs a franchise—I don't mean a franchise in the strict sense, but to supply

(Testimony of Sidney M. Lewis.)

Flintkote tile to them—and discussed it with Mr. Krause first?

A. It would hardly seem possible that we would.

Mr. Ackerson: That is all, Mr. Lewis.

(Witness excused.)

Mr. Black: If your Honor please, I am fresh out of witnesses for the day. I assumed that the cross-examination would be a little more extensive and I mis-estimated it by 10 minutes.

The Court: How long do you anticipate the further presentation of your case?

Mr. Black: I think we should, depending of course on the length of cross-examination—we think we are nearly through. We have quite a few additional witnesses but most of them are very short, just little bits of pieces, so to speak. I would imagine one full afternoon's session.

Mr. Ackerson: Since Mr. Black doesn't confide in me about his witnesses or subject matter, but anticipating in my own mind what they will be, I think my cross-examination [1103] will be very brief, your Honor.

And I will have perhaps a half hour or an hour of rebuttal.

The Court: Then we ought to finish the case early next week.

Mr. Black: I would think so.

Mr. Ackerson: Yes.

The Court: I am interested to know what the prospects are because we have a case set for trial here next Tuesday.

Mr. Black: All I can say is that the direct examination will be relatively short with my additional witnesses.

Mr. Ackerson: I think we could anticipate finishing very early next week. I am a little bit in the dark here, but if I can correctly surmise what Mr. Black is going to do, I can still state that my cross-examination will be very short.

The Court: Very well. The further trial of this case is recessed until tomorrow at 1:30, and the court is recessed until tomorrow morning at 9:30.

(Whereupon, at 4:15 o'clock p.m., an adjournment was taken until 1:30 o'clock p.m., Friday, May 20, 1955.) [1104]

May 20, 1955; 1:30 o'Clock P.M.

The Court: Proceed with the trial.

Mr. Black: Call Mr. Harkins, if the court please.

FRANK S. HARKINS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Frank S. Harkins.

Direct Examination

By Mr. Black:

Q. What is your present occupation, Mr. Harkins?

A. I am in business for myself under the name

(Testimony of Frank S. Harkins.)

of the Harkins Distributing Company.

Q. How long have you been in business for yourself? A. Since May 9th of last year.

Q. From what place did you go to your present occupation?

A. From The Flintkote Company.

Q. And what was your position there?

A. I was manager of the building materials division.

Q. How long did you hold that position?

A. The tile probably 15, 16 years; I was down there about 19. [1106]

Q. And was your relation with that company continuous for that period? A. Yes.

Q. And I take it that you were occupying that position in the summer of 1951 through the spring of 1952? A. Yes.

Q. Will you briefly describe your duties in that position, Mr. Harkins?

A. Well, actually the company was divided into two parts, the paper section and the so-called building materials section, and for part of that time I had charge of all activities in the building materials division, subsequently the sales end of it primarily.

Q. Was acoustical tile included in the materials with which you dealt? A. Oh, yes.

Q. Will you tell me as briefly as possible the experience of your company in connection with the development of that commodity in this area?

A. Well, in May, I believe, of 1948 we bought the Hawaiian cane products plant of Honolulu

(Testimony of Frank S. Harkins.)

and Hilo and as a product of that mill acoustical tile was manufactured. It became one of the various items that were acquired in the acquisition of their insulating board plant.

The acoustical tile business is rather separate from the [1107] so-called dealer items like sheathing and board for tile and planking of walls. If I understand your question, you would like to know when we started in the acoustical tile business?

Q. Yes. Review it briefly, if you will.

A. Well, they had a machine and were manufacturing acoustical tile when we acquired it. We therefore acquired the problem of distributing it.

At that time, getting back to the background of the industry a little bit, because the acoustical or drill board industry differs a little from the others, it is a separate industry; it had been the practice, we will say, or the custom of the industry to sell that through special contractors who promoted it, sold it, and so forth, and we had the decision to make as to whether to make a general line product out of it or a specialty line product.

We elected to sell the board, the drill board, acoustical board, to recognized acoustical contractors and not throw it into the dealer or general line position, which is what we did. And we sold many people in the acoustical contracting field the board.

Now beyond that point—do you want me just to continue with the history?

(Testimony of Frank S. Harkins.)

Q. Yes, with particular reference to the Los Angeles area.

A. Well, that would apply to Los Angeles and other [1108] places, too. In the Los Angeles area we sold a great many acoustical contractors the acoustical board, the product of the mill. We were in this postition actually, we had a very, very short line as related to some of the older people in the business, because actually the Hilo machine to drill the board had only been in a few months before we acquired the plant. So we had a very short line and were not in position actually to compete on a full line basis with the founder of the business, which of course was Celotex.

So we took our business from a group of acoustical contractors, which I could recite probably.

As we improved it and as we improved the line and extended the products and as our relationship with the people that we were selling became a little more clear, it seemed advisable because of the development of our situation or improvement to get on some kind of a firm distribution policy, which we did, by electing, all of us, to limit our distribution to three of the contractors who at that time seemed to us to have the greatest potential for us on this split line basis.

Q. What do you mean by "split line basis"?

A. Well, that is an account that handles more than one make or product. In other words, our setup with Dick Howard, for example, that seemed to be very advantageous from our standpoint be-

(Testimony of Frank S. Harkins.)

cause one of the elements in the market, which was a problem, was the manufacturing of incombustible tile, [1109] we didn't have. Through Dick Howard's association with his supplier they had incombustible tile so the two blended together very well.

Our drill board with the holes in it and his incombustible tile completed a line or more or less built up a line.

And the setup with Coast, with Mr. Newport's organization, was somewhat of the same type. I mean, he had Simpson products and we had a great many things that Simpson didn't have and they, in turn, had some things we didn't have.

So there was a natural filling out or a natural correlation from a sales or line standpoint with these folks that we finally elected to do the business with, or that we restricted our [1110] distribution to.

Q. At the time I am speaking of, the fall of 1951, who were the Flintkote customers in this area?

A. I believe at that time we were selling only Coast Insulation, Dick Howard, and I believe Sound Control at that time.

Q. And did you have any contracts with these people that there would be only those distributors in this area?

A. No, no strictly sales policy, enunciated sales policy, no contract.

Q. Was that policy determined exclusively by The Flintkote Company? A. Oh, yes.

(Testimony of Frank S. Harkins.)

Mr. Ackerson: Well now, your Honor, I move the answer be stricken for the purpose of an objection.

The Court: Granted.

Mr. Ackerson: I object on the ground that this is a conclusion and hearsay.

Mr. Black: I submit the witness had the——

Q. (By Mr. Black): You had the determination of that policy in your own hands, did you not?

A. I did.

Q. You didn't have to get any orders from anybody else? A. No, sir.

Q. And who fixed the policy? [1111]

A. I did.

Mr. Black: I think that answers my question.

Mr. Ackerson: I object to it on the ground of hearsay.

The Court: Overruled. You don't have to prove a conspiracy of this kind, the kind you allege here, by introducing a resolution of the board of directors. You don't have to prove every corporate act in defense, by such a means, either.

Mr. Ackerson: I think you are right.

Q. (By Mr. Black): Mr. Harkins, what was the first knowledge or notice you had of the possibility of business relations with Messrs. Lysfjord and Waldron in the acoustical tile business?

A. What or when? I couldn't say when. I would say that several times in, oh, perhaps a year preceding the period you are talking about I had had word from, oh, either Mr. Baymiller or Mr. Rag-

(Testimony of Frank S. Harkins.)

land or somebody—well, I think originally it came through Baymiller that these friends of Mr. Ragland were very anxious to go into business and wanted to enter into the acoustical contracting business in Los Angeles.

That was not an uncommon request at that time, because there were a great many people who were seeking sources of supply for acoustical board. The product was in short supply.

Mr. Ackerson: Your Honor please, I object to this as not [1112] being responsive to the question; opinion.

The Court: I think the objection is probably good. Listen to the exact question and try to limit the answer to the exact question.

Mr. Black: I think that the question—will you read the question?

(Question read.)

The Witness: Possibly a year before the fall of '51.

Q. (By Mr. Black): What information came to you and from what source?

A. Mr. Baymiller, I believe, told me that two friends of Mr. Ragland were very anxious to go into the acoustical tile business.

Q. What was the situation with respect to additional accounts in the Los Angeles area at that time? A. I said no.

Mr. Ackerson: I move that be stricken as not responsive, either, your Honor.

(Testimony of Frank S. Harkins.)

The Court: What about it, Mr. Black?

Mr. Black: Well, it was a short answer to my question. It is exactly the situation that I wish to develop on this score.

Q. (By Mr. Black): I will put it this way: Were you looking for additional outlets in the Los Angeles area at that time? [1113]

A. No.

Q. Then will you proceed with the developments that ultimately led you to have further contact with the plaintiffs in this case, looking toward the establishment of a business relation with them?

A. I will do so, as briefly as possible. This interest of the gentlemen, the friends of Mr. Ragland, came to me not once but two or three times. I said no on each subsequent approach.

I was then told that they were going to contact these gentlement and have lunch with them, to discuss the matter further. They had asked for some kind of a session to really go over the possibility of becoming a contractor.

I was subsequently told that they wanted to go in business in San Bernardino.

Mr. Ackerson: May we have the time and place and the parties present, Mr. Black?

Mr. Black: Can you fix that time fairly accurately, when you were told?

The Witness: Which time and what place?

Q. (By Mr. Black): When you were told they were being considered for San Bernardino.

(Testimony of Frank S. Harkins.)

Mr. Ackerson: Who told him that?

The Witness: Mr. Thompson.

Q. (By Mr. Black): About what time was that, can you [1114] place it?

A. I would say it was late in the year; probably in November.

Q. 1951? A. Yes.

Q. What, if anything, did you do in response to that suggestion?

A. Well, I asked Mr. Thompson if they were interested, actually seriously interested in establishing these people as contractors in San Bernadino.

He said yes, he thought they might be all right. He said, "Do you want to meet them?"

I said, "I would like very much to. Before we are going to take on anybody in the area, even though San Bernardino, I would like to meet these people, I would like to see what they look like."

Q. Was anything done to arrange a meeting?

A. A meeting was arranged.

Q. Did you attend such a meeting yourself?

A. It was in my office.

Q. Who else was present?

A. I think Mr. Lewis was in and out of the meeting a couple of time.

Mr. Thompson was there during the entire meeting. The two gentlemen were there. I think that is all. [1115]

Q. Now, Mr. Harkins, I am going to ask you to relate as nearly as you can the discussion that ensued at that meeting.

(Testimony of Frank S. Harkins.)

I wish to make this admonition to you, if I may: In giving us your version of what went on at that meeting, please try to give us as nearly as you can recollect the substance of what actually was said and who said it, rather than your summarization of the effect or the conclusion that you would draw from what was said.

Do I make myself clear? A. Yes.

Q. Then would you just—just one more question. Was Mr. Ragland present?

A. No—I don't think so. He may have been. If he was—as a matter of fact, there was practically no discussion, conversation with anybody there except me with the two gentlemen. If he was there, he was sitting in a corner quietly. I am not aware he was there.

Q. Then you will kindly relate, as nearly as you can now recollect, what was said by you and by the plaintiffs at that meeting?

A. The first—I mean there were introductions, et cetera, et cetera.

They then handed me a financial statment, et cetera. I looked that over. I recall that in the book of particulars [1116] that they had a little operating forecast made up for this business.

As I recall it, I commented about that and complimented them on going far enough in their thinking to prepare a little opening statement. And disposed of the credit statement on the theory it would go to the credit department, anyhow, and we set that aside.

(Testimony of Frank S. Harkins.)

The conversation from then, both the gentlemen explained their backgrounds, I mean in the industry and their knowledge of the sale and application of the product.

I couldn't tell which was which because I couldn't recognize hardly today, as a matter of fact. But they outlined their background and experience rather completely.

I subsequently said, about the only thing I remember of note, that I had been particularly interested in the meeting because I thought there were generally three things that caused failure in business. I don't like to see people leave good jobs and go into business simply for the purpose of going into the business and then not making a success of it.

I said, "No. 1 is generally a lack of capital."

I said, "Your statement indicates that for a small business you will probably get along all right. We will show that to Mr. McAdow."

And I said, "No. 2 is lack of experience." I said, "You both indicate that you have very good working knowledge [1117] of both sales and application."

And I said, "No. 3 is general sales opportunity. You can't sell where there aren't people to buy. If you are satisfied there is enough sales opportunity in the area, that would answer the third requirement."

And one of them assured me they made a very

(Testimony of Frank S. Harkins.)

careful study of the area and there was just lots of business down there to support their operation.

So I said, "That answers my three requisites," and I said, "That is about all there is to it." [1118]

Mr. Black: May I have that financial statement? I am not sure that I know the exhibit number.

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Black): I show you, Mr. Harkins, Plaintiffs' Exhibit 44, which is a folder marked aabeta company, Los Angeles, showing a financial condition as of December 1, 1951, and I will ask you if you recognize that as the document you saw when you refer to the financial statement.

A. (Examining exhibit): This is it.

Q. I call your attention the place "Los Angeles" under the name "aabeta company." Since it has been offered in evidence a red ring has been drawn around that name, which we understand was not there at the time. Do you recall whether you saw that word or not at the time you examined it?

A. I don't imagine I was very conscious of the cover, that I never saw either the aabeta or the address.

Q. Do you recall anything else that was said at that meeting other than what you have related?

A. Not specifically. I remember when we were there, Mr. Thompson said, "Is that all?"

I said, "Yes, that is all as far as I am concerned."

(Testimony of Frank S. Harkins.)

There was some general conversation. I presume the gentlemen were in the office 15 or 20 minutes, and it had taken me three to brief it. [1119]

Q. But that is all you now recall that has any bearing on your business relations with these people? A. Yes.

Q. When was the next occasion you had to deal in any way with the activities of the aabeta company?

A. Well, assuming the placement and shipment of orders, I had nothing directly to do with them. The next time I had anything to do with the operations was when I returned from San Francisco in, I would say, February sometime of '52. I got back from San Francisco I believe on a Wednesday morning and I stayed at the office and Mr. Lewis came into the office and said that there had been some difficulty.

I said, "What is the trouble?"

He said, "Well, this aabeta crowd are not doing as they agreed to do. They are, according to reports we have, soliciting business in Los Angeles, making bids to all the Los Angeles general contractors and were very active downtown."

Also he stated, "It is further reported that they have a warehouse and place of business here someplace in town."

I said, "Oh, is that so?"

So he said, "There has been quite a lot of commotion about it."

I said, "Where is Ragland?"

(Testimony of Frank S. Harkins.)

He said, "He is in the Northwest." [1120]

I said, "When will he be back?"

He said, "He will be back Friday morning."

"Well," I said, "as soon as he gets back we will put him on it and let him get out and see what he can find out to verify the report."

And which we did.

Mr. Lewis also told me that he had had a telephone call from Mr. Krause of Coast Insulating, and that Mr. Krause had wanted to get a meeting of some kind together to discuss the situation, which was not in accordance with our understanding, and Mr. Lewis had said that he or nobody from the company would attempt such a meeting. He said, "Did I do right?"

I said, "Eminently."

I said, "There will be no meetings of that sort with the distributors at this point."

So I got ahold of Mr. Newport, who I have known for many years, and I told Charlie that we would have lunch on Friday together, which we did.

Do you wish me to continue from there?

Q. Yes. What did Mr. Newport say on that occasion?

Q. Well, I went out to his place of business and picked Mr. Newport up and we went over to the Brown Derby.

Before we left for the Brown Derby I told Mr. Newport that I had heard about this story that Krause had called in, and so forth. I said, "I want to make it perfectly clear to [1121] you that I am

(Testimony of Frank S. Harkins.)

not going to discuss the matter of the aabeta company with you now. I don't want you to discuss it with me. When a decision is made it will be based on the facts as we find them and it will be for our benefit, it will be for the good of The Flintkote Company."

I said, "I will not discuss the matter with you at all."

Q. Did Mr. Newport ever make any threat of boycotting The Flintkote Company——

A. No.

Q. ——if——

Mr. Ackerson: Your Honor please. Mr. Black, will you ask what Mr. Newport said? After all, I must object otherwise. I don't know what Mr. Harkins considers a threat. Will you ask him the direct question and avoid objections?

Q. (By Mr. Black): Did Mr. Newport say in your presence at any time that he would spend $40,000 or $50,000 to see to it that not another piece of Flintkote tile was ever sold in the Los Angeles area if the aabeta company were not thrown out of business? A. Never.

Q. Did you ever hear of such a statement from Mr. Newport? A. No.

Q. How well did you know him? [1122]

A. Oh, I didn't see Charlie very often, but the family lived near us and his daughter, before she was killed, and my son were playing around with the same crowd and I have known him off and on for 17, 18, years.

(Testimony of Frank S. Harkins.)

Q. Do you know where he is now?

A. I understand he is in Europe.

Q. Did you ever hear of any meeting of the general acoustical contractors dealing with Flintkote products relating to this aabeta situation?

Mr. Ackerson: May I have that question again?

The Witness: I don't know——

Mr. Ackerson: Just a moment. I didn't hear the question, Mr. Harkins. I am sorry.

> (The question referred to was read by the reporter as follows: "Q. Did you ever hear of any meeting of the general acoustical contractors dealing with Flintkote products relating to this aabeta situation?")

The Witness: The only meeting I ever heard of was the one that Sid told me that they were trying to get together to talk to them on, which was never held as far as I know.

Q. (By Mr. Black): As far as you know, it was never held? A. No.

Q. You never attended any such meeting [1123] yourself? A. No.

Q. And you never heard from any of The Flintkote people that they had attended any such meeting? A. No.

Q. Did Mr. Newport say he would boycott The Flintkote Company if they did not discharge the aabeta company? A. He never did to me.

Q. Have you ever heard of any such statement from him? A. No.

(Testimony of Frank S. Harkins.)

Q. Have you ever heard of any such statement in similar language being made by any of The Flintkote customers in this connection?

A. No.

Q. Did any of these people come to the Flintkote office at the time you were concerned with this problem? A. Not when I was there.

Q. After you returned from San Francisco, were you there for several days continuously?

A. Yes, I was there, I presume—I know—for the next 10 days or two weeks because that is during the period of the investigation.

Q. And during that time did any of the acoustical tile contractors dealing in Flintkote products come to your office?

A. They did not come to me, as far as I know.

Q. As far as you personally knew? [1124]

A. No.

Q. Then what subsequently developed in connection with this investigation?

A. Ragland came back and we sent him out to see if he could verify some of these reports, and also to see if he could find the alleged downtown warehouse and Los Angeles operation.

He first came back and said he couldn't find it. As a matter of fact, he found a carpet place at the location he was looking for. But later on he did. I believe it was by picking up a business card——

Mr. Ackerson: Just a moment, your Honor. I object to this is opinion and hearsay, no foundation laid.

(Testimony of Frank S. Harkins.)

The Court: Sustained.

Q. (By Mr. Black): What next happened to your personal knowledge?

A. He eventually found the Los Angeles address or the uptown address of the aabeta company as a warehouse, and he also found that they were bidding a substantial number of jobs in this area. He made that report to me verbally and also in writing.

Q. I show you, Mr. Harkins, a document which has been offered in evidence as Defendants' Exhibit I, which purports to be an inter-office letter from Mr. Ragland to yourself, and ask you if that is the document you are referring to. [1125]

A. (Examining exhibit): Yes.

Q. Did you have any practice or custom in your office with respect to noting on a document whether you had seen it or not?

A. That is my initial (indicating).

Q. Referring to the initial "H" at the lower left-hand corner of the document?

A. Yes. And that is my standard way of noting it for file.

Q. By drawing a line diagonally down the page, as it is here? A. Yes, sir.

Q. And you did that at the time?

A. Yes, sir.

Q. To the best of your knowledge was that looked at by you about the date that it bears?

A. Yes, sir.

(Testimony of Frank S. Harkins.)

Q. What next developed in this connection after the receipt of that report?

A. Well, the next thing developed of course was a discussion between Baymiller and Thompson and Sid Lewis and myself regarding the facts as they had been developed.

I very carefully went back over the ground with Mr. Thompson and Mr. Baymiller regarding the previous meetings of these people to be positive that there had been no misunderstanding [1126] in my mind or in theirs as to the terms and conditions under which we were approving them as acoustical contractors in San Bernardino.

I satisfied myself in the review of those facts and the various discussions and the so-called luncheon——

Mr. Ackerson: Your Honor please, this is not responsive either. I think Mr. Harkins ought to state what was done. As I recall the question, that was the question. I will object to it as not [1127] responsive.

Mr. Black: If the court please, this is exactly one of the matters at issue in this case, namely, the motives and purposes of the defendant in discharging these people.

Mr. Ackerson: I am merely asking that the proper question be asked and the proper answer be given.

The Court: The objection went to the question, but you waited until after it was answered to place an objection. If what you are getting at is the form

(Testimony of Frank S. Harkins.)

of the answer, you don't reach the form of an answer by an objection to the question.

Mr. Ackerson: Very well. I think I heard your Honor's warning to Mr. Black at the beginning of this case, and I am afraid I did the same thing. I will withdraw it.

The Court: All right.

Q. (By Mr. Black): Will you proceed, Mr. Harkins, and if you need the thread picked up by the reporter, we can do that.

Do you recall where you stopped?

A. Yes, I believe I was——

Q. You may proceed.

A. I believe I was discussing the further investigation I made of the background to the arrangements before they finally came to my office to get an approval.

I satisfied myself, both in Mr. Baymiller's mind and Mr. Thompson's mind, there was no question as to our status of doing business with these people at San Bernardino. [1128]

Very shortly thereafter, perhaps at the same meeting, I said, "I think we have no option here. We have a violation of a very definite agreement."

And I said, "We will cease from selling them."

I said, "You and Mr. Thompson will take that responsibility and tell the people we will no longer consider them as approved acoustical contractors. If they have any jobs on which our material is required, if they have any outstanding bids on our material, they will be given a reasonable length of

(Testimony of Frank S. Harkins.)

time, three or four weeks, to convert the outstanding business into firm contracts and we will still supply the material."

Q. What happened then?

A. Mr. Thompson went, I presume went to their place. I didn't go with him. Mr. Baymiller did go.

And he advised the gentlemen we were terminating our sales agreement with them, we were no longer going to consider them as approved contractors.

And he also told them the same thing, that they would be given any reasonable period of time to get the materials for contracts they then had in force or for any outstanding bids where materials would be required. As a matter of fact, we supplied material to them subsequent to the cancellation.

Q. What personally did you have to do with this matter after that, Mr. Harkins? [1129]

A. Nothing.

Q. That was your last connection with the episode? A. Yes.

Q. That is, personally? A. Yes.

Q. During any of this period, between the summer of 1951, through the period of this termination of relations, did you have any knowledge or notice of any program of job allocating between the acoustical contractors in the Los Angeles area?

A. No.

Q. Did you have any notice or knowledge that there was any scheme for price fixing going on between the contractors? A. No.

(Testimony of Frank S. Harkins.)

Q. One more question. At your meeting with these plaintiffs, was anything said as respects the fact that the plaintiffs were selling nothing but Flintkote tile or would be selling nothing but Flintkote tile? Was that subject mentioned?

A. No, sir, not to my knowledge.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. As I recall your testimony, Mr. Harkins, you said [1130] you were particularly interested and examined that part of this financial statement that had to do with sort of a projection of future business ideas, you know, activities and quantities in the future.

You were interested in that and that was one of the three points you called to their attention.

A. No, that isn't exactly what I said.

Q. What was that?

A. What I said was I would look over—you can read it back if you want to.

Q. I just want to know what you said.

A. What I said was, I commented on the fact they had prepared a little operating budget.

I said it was quite unusual for people to get that far, they usually prepare financial statements, but not an operating statement.

Q. You complimented them on that.

(Testimony of Frank S. Harkins.)

A. Yes.

Q. And you thought that was very good?

A. Yes.

Q. You noted that particularly, didn't you?

A. That is one of the ways I identified the document.

Q. Yes. I want to ask you to identify the document again by that particular part of it, Mr. Harkins. This is the part of the document you refer to, isn't it (indicating)? [1131]

A. Yes. They had a total value for us in March —I mean that was their cash requirements for cash operating, et cetera.

Q. That is what you complimented them on particularly, wasn't it?

A. Yes. I said that it was rather unusual for people to go beyond strictly a financial statement and try to prepare a little cash operating statement.

Q. It showed unusual foresight and you noted that? A. I noted it.

Mr. Ackerson: I would like the jury to note that on this particular page of Exhibit 44 in evidence the address of the aabeta co. on this page.

Mr. Black: There is no question. That is just a matter of argument.

The Court: Any counsel may pass any exhibit to the jury whenever they please.

Mr. Black: The witness is entitled to have that matter drawn to his attention. It is unrelated to any question.

(Testimony of Frank S. Harkins.)

The Court: At the beginning of the trial I said that unless I departed from my usual custom, that any counsel may have any exhibit passed to the jury at any time he deems it appropriate.

We will not depart from that, which has been my custom in almost five years now, and I picked that up from Judge [1132] McCormick who sat here for almost 30 years ahead of me.

Mr. Ackerson: I think that was one of the first things your Honor announced at this trial.

Mr. Black: We have no objection to the jury examining it, but the comment of counsel was unrelated to any question.

Mr. Ackerson: I had to direct the portion of the document I wanted to call to the jury's attention.

The Court: Since it was a long document and he only wanted to call their attention to a small part of it, I think his comment is proper. You can do the same, Mr. Black.

Q. (By Mr. Ackerson): Mr. Harkins, this is a defendants' Exhibit J in evidence. It was introduced by Mr. Lewis yesterday as the total yearly volume of sales of Flintkote acoustical tile to four Flintkote dealers.

I mean it includes Sound Control up to the first part of 1952. Then it substitutes Acoustics, Inc., for Sound Control. A. Yes.

Q. You will note, will you, Mr. Harkins, that in the year 1941 Coast Insulating——

A. '51 you mean?

Q. Yes, '51. Coast Insulating Products——

(Testimony of Frank S. Harkins.)

A. Yes.

Q. ——That they purchased $51,816.54 worth of tile from Flintkote. A. Yes. [1133]

Q. And that Howard Company purchased $53,-015.98 worth of tile. A. Yes.

Q. You will note on the second page that during the same year, 1951, Sound Control purchased $35,348.61 worth of tile, is that correct?

A. I wouldn't know.

Q. I mean, that is what you see on the exhibit, is it not? A. I see it, yes.

Q. This is preliminary. The previous year, in 1950, Sound Control purchased only $17,449.20 worth. A. Yes.

Q. I am reading those figures correctly?

A. Yes.

Q. You note that in 1952 Coast purchased fifty-eight thousand plus dollars worth. Howard purchased forty-nine. But in '53 you note that Coast purchased $89,000.00 and Howard purchased $125,-000.00 worth of Flintkote tile, is that right?

A. Yes.

Q. Now, I would like to ask a couple of questions on the basis of those figures, Mr. Harkins.

I believe you have testified that Mr. Lewis told you about Gustaf Krause calling up. [1134]

A. That is correct.

Q. And I believe you said that you caused an investigation to be made thereafter and so on. I wanted to ask you whether or not you ever talked directly with Gustaf Krause, No. 1, about the

(Testimony of Frank S. Harkins.)

plaintiffs' business. A. No.

Q. You stated you talked with Mr. Newport of Coast Insulating? A. Yes.

Q. And that he was an old friend of yours? You had known him seven or eight years, and he was a neighbor? A. Yes.

Q. Did you ever talk with Mr. Howard of Howard Company about plaintiffs' business?

A. I have never met Mr. Howard.

Q. Never met him. Was any conversation of Mr. Howard with either Mr. Lewis, Mr. Thompson, Mr. Baymiller, or Mr. Ragland called to your attention, that is, any conversation concerning plaintiffs' business? A. No.

Q. Was it ever called to your attention that your existing Flintkote outlet, namely, Coast and Howard, might agree to purchase more Flintkote tile if you did cut these people off?

A. Will you state that again? [1135]

Q. Was it ever indicated to you through either Baymiller, Ragland or Thompson or Lewis that either Howard or Coast Insulating might purchase more Flintkote tile if you terminated these plaintifs? A. Never.

Q. Never. At the time, 1951, was when you were negotiating with plaintiffs, wasn't it, started in June, I believe, Mr. Harkins? A. Yes.

Q. I know you say it, but I think your prior testimony shows the serious conversations started about June when Mr. Ragland became definitely associated with acoustical tile line of Flintkote.

(Testimony of Frank S. Harkins.)

A. Yes.

Q. Which, I think, was June 1st. At that time, the previous year, I should say, we have noted that Sound Control only purchased $17,449.20 worth of acoustical tile from Flintkote.

A. Yes. [1136]

Q. Is it possible, Mr. Harkins, that you needed another outlet in the Los Angeles territory at that time who could supply Flintkote tile? Had you considered that fact?

A. No. We didn't need any additional distribution. We were actually taking off distribution.

Q. Was Sound Control satisfactory to you in 1951?

A. We changed from Sound Control to Acoustics, Inc., ultimately.

Q. I know, but in 1951.

A. No, they were a disappointment to us.

Q. Did you ever talk to them about supplanting them with another distributor?

A. Not in '51.

Q. But in early '52 you did, as I understand it, is that right?

A. Some time in '52 we changed from Sound Control to Acoustics, Inc.

Q. Did you talk with Mr. Hoppe about that personally? A. No.

Q. Was it ever called to your attention that Mr. Hoppe at the time these plaintiffs came into business in Los Angeles threatened to quit handling

(Testimony of Frank S. Harkins.)

your tile? A. Not to my knowledge.

Q. Assuming, Mr. Harkins, that these plaintiffs through their financial statement, their other statements to [1137] you about experience, past sales experience, quantities, and so forth, could have sold a minimum of a carload of Flintkote tile a month, is it still your statement that you would still prefer to have Sound Control in there? You would still not permit them to operate in the Los Angeles area?

A. I think that is a hypothetical question in the first place.

Q. That is true, but I mean you have answered as an expert in the past and I think you should be able to answer this question.

A. Our negotiations with these people were not as to whether they would supply a $60,000 volume in the city of Los Angeles or not.

Q. No.

A. The discussion with them was whether they wanted to go into business in San Bernardino or not.

Q. Well, that is your statement. I realize that, Mr. Harkins. But that is the issue in question here, too.

My question was, and it is only partially an assumption, in 1950, the year immediately preceding this, Sound Control, one of your three distributors, purchased only $17,449 worth of tile from you. And I say now to you, as an expert in Flintkote, the chief of the 11 western states out here, if the

(Testimony of Frank S. Harkins.)

facts presented to you by these plaintiffs showed that they could handle a minimum of one or two carloads a month, [1138] would you have been willing to permit them to supplant Sound Control in this area?

A. Under certain circumstances, surely.

Q. What circumstances?

A. But that never was approached and that never was demonstrated, that that is what they intended to do or could do.

Q. They told you what they had been selling for Downer Company, didn't they?

A. That is a little different. Somebody coming from Harold Shugart might tell me that Mr. Shugart is doing a great deal of business. That I agree to.

Q. The question was based on an assumption and you said under certain conditions.

A. Yes.

Q. Well, now, Coast in 1951—that is a big outfit, isn't it? A. Yes.

Q. They apply a lot of tile every year, don't they?

A. Yes, they had very good volume.

Q. A carload of acoustical tile is usually figured on a basis of 60,000 units, is it not?

A. 56,000.

Q. 56,000? A. 56,000 square feet. [1139]

Q. And it is based on half-inch tile?

A. Half-inch tile.

Q. Then if you have a quarter-inch tile, it adds

(Testimony of Frank S. Harkins.)

to the units and you may get less units or you may get the same units of tile.

A. It is based on the size.

Q. I think your answer is that it is 56,000 units, but I mean for mathematics here, and to make it easier, if it does make it easier for you, how many carloads of Flintkote tile did this large Coast outfit order during the year 1951 based on your figures from your books here?

A. It is roughly 10 carloads.

Q. Less than a carload a month?

A. Yes.

Q. And of course the answer would be the same for Howard, wouldn't it? A. Yes.

Q. Roughly 10 carloads? A. Yes.

Q. Well, it is a little less than 10 carloads in each instance, isn't it?

A. Yes. They run around $5,000.

Q. I think the first carload these plaintiffs ordered was $6,038 and something.

A. That is more than a minimum car. You based your [1140] question on the fact that a minimum car is 56,000 square feet of half-inch, which would run about $5,000, which is what I said.

Q. All right. It makes no difference.

Now in 1950 Sound Control purchased $17,449. That would be about three cars plus.

A. Three cars, yes.

Q. And in '51 they purchased $35,348 worth of acoustical tile, which would be approximately six cars, is that right? A. Yes.

(Testimony of Frank S. Harkins.)

Q. And I note that beginning in 1953—let me strike that, Mr. Reporter; I have a preliminary question.

In your experience with Flintkote—you probably can answer this question, Mr. Harkins—you know, do you not, that in the acoustical tile contracting business there is a lapse usually of a number of months between bidding a job and installing a job? A. Yes, in some cases.

Q. And in large jobs, at least the substantial work, it ranges from maybe two or three to maybe as high as 10 months, doesn't it?

A. It depends on the job.

Q. And these large jobs account for the great bulk of the sale of acoustical tile, do they [1141] not? A. Yes, I think so.

Q. Now I point out the fact that beginning in 1953 the Coast Company jumped their purchases of tile—jumped to $58,000 from 1951 to '52; they jumped from $58,000 in '52 to $89,000 in '53; and they jumped from $89,000 in '53 to $102,000 in '54—and I ask the question if that increase in tile purchases had anything to do with the conferences of Coast and Howard concerning the operation of the plaintiffs in Los Angeles.

A. Nothing whatsoever. [1142]

Q. They never promised——

A. Nothing whatsoever.

Q. ——to increase their purchases of Flintkote tile? A. Never.

(Testimony of Frank S. Harkins.)

Q. And you state that Mr. Hoppe never did say he would quit handling your tile if you didn't?

A. Not to me or that I ever heard of.

Q. Now I would like to start at the end of your testimony, Mr. Harkins, and I am referring to the conference in your office when these plaintiffs were accepted as acoustical tile dealers, and I believe you stated to your recollection Mr. Ragland was not there?

A. I said if he was I wasn't conscious of it.

Q. And Mr. Baymiller was not there?

A. No.

Q. So that I take it, according to your recollection, Mr. Thompson brought them in and introduced the plaintiffs to you? A. Yes.

Q. And that was the first you had met either of them? A. That is right.

Q. Did Mr. Thompson remain there during the entire session?

A. Yes, during the entire meeting.

Q. You are positive of that? [1143]

A. I am positive of that.

Q. At that meeting, aside from looking over this financial statement, you had a friendly chat, as you would with any other new client or customer?

A. I trust so.

Q. You told them, did you not, about your own experiences in coming up in the Flintkote field by way of encouragement?

A. Not that I recall, no.

(Testimony of Frank S. Harkins.)

Q. Well, you talked about your past experience?

A. You say I did. I said I don't recall that I did.

Q. All right. Did you mention the Convair job out at Pomona? A. I don't know.

Q. Don't you recall, Mr. Harkins, that you mentioned that in the conversation and pointed out that Flintkote had sold a very large amount of roofing on the job? A. We did.

Q. You sold about a million and a half square feet on it, didn't you?

A. I will have to do a little computing. I think they said it was 14 acres of roofing out there.

Q. Well, I don't care. I checked on the phone the other day.

A. Yes, it was a very large job. [1144]

Q. It was a very nice job? A. Yes.

Q. And it was performed by Associated Roofing and I believe another roofing company?

A. Acme.

Q. Acme, yes. And I think that you had your man Jim Marlowe out there assisting or advising or something? He is your architectural expert?

A. I doubt if Jim was ever on the job.

Q. Well, I have been misinformed then.

Now does that refresh your recollection any as to whether or not you mentioned that job?

A. No.

Q. You just don't recall?

A. As a matter of fact, this job was mentioned to a great many people at times. It was the biggest

(Testimony of Frank S. Harkins.)

thing in Southern California. Whether we spoke about it at that time or not I have no idea.

Q. Then I can't ask you any more particulars about that particular thing.

Now we will go back to the first part of your testimony, Mr. Harkins. You stated, I believe—and it has been testified before—that Flintkote entered the acoustical tile field by the acquisition of this Hilo plant in 1948? A. Yes. [1145]

Q. And at that time you didn't manufacture anywhere near what they call a full line, I mean all sizes? A. That is right.

Q. In 1951 you did have more or less of a full line, did you not?

A. We had added a great many things at that particular time. I couldn't say what all had been added, but it had been built up pretty rapidly.

Q. You were pretty well up with any of your competitors as far as a full line went at that time?

A. Thank you.

Q. In fact, I think there was only one that may have had an extra size that you didn't have, wasn't there? You were up with the trade anyway?

A. Yes, we thought we were.

Q. And when you first started in 1948 you testified that you looked over the situation, you didn't have a full line, you found that—stop me, you can correct me because my memory is memory only, Mr. Harkins—but that you looked over the distribution of acoustical tile not only here but else-

(Testimony of Frank S. Harkins.)

Q. Well, you talked about your past experience?

A. You say I did. I said I don't recall that I did.

Q. All right. Did you mention the Convair job out at Pomona? A. I don't know.

Q. Don't you recall, Mr. Harkins, that you mentioned that in the conversation and pointed out that Flintkote had sold a very large amount of roofing on the job? A. We did.

Q. You sold about a million and a half square feet on it, didn't you?

A. I will have to do a little computing. I think they said it was 14 acres of roofing out there.

Q. Well, I don't care. I checked on the phone the other day.

A. Yes, it was a very large job. [1144]

Q. It was a very nice job? A. Yes.

Q. And it was performed by Associated Roofing and I believe another roofing company?

A. Acme.

Q. Acme, yes. And I think that you had your man Jim Marlowe out there assisting or advising or something? He is your architectural expert?

A. I doubt if Jim was ever on the job.

Q. Well, I have been misinformed then.

Now does that refresh your recollection any as to whether or not you mentioned that job?

A. No.

Q. You just don't recall?

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(Testimony of Frank S. Harkins.)

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(Testimony of Frank S. Harkins.)

where and you found that it was distributed by and large through established contractors?

A. Yes. [1146]

Q. And you decided to follow that general industry pattern yourself? A. Yes.

Q. And you did. A. Right.

Q. I take it that as a result of that decision you picked out Sound Control, Coast Insulating and Howard? A. No.

Q. No? A. No.

Q. Were they your first—— A. No.

Q. ——distributors?

A. No. I don't think we started to sell Coast until probably '49 or '50; probably nearer '50.

Q. After about a year.

A. It was the only thing we did initially. I tried to point out we had the decision to make initially whether we were going to throw acoustical tile into the general dealer line and distribute it through lumber dealers and hardware stores, et cetera, or restrict the sale of acoustical tile, as it had been historically the pattern of the industry, with the approved acoustical tile contractors. We decided to stay with the acoustical, approved acoustical tile contractors. We had no other approved sales policy at that time.

Q. By 1953 you had these three established, Sound [1147] Control, Coast, and Howard?

A. That is right, yes.

Q. When they took on your line they had been in a competing line from many years, hadn't they?

(Testimony of Frank S. Harkins.)

A. All of them, they all had other lines.

Q. In other words, Howard had U.S. Gypsum.

A. Yes.

Q. I think Sound Control had National Gypsum at that time?

A. And I think Fir-Tex, probably, at that time.

Q. And Coast had another line of tile.

A. Simpson.

Q. Simpson? A. Yes.

Q. When you awarded them this line of tile prior to '50 or in '50, did you have any assurance they would purchase Flintkote tile or would give Flintkote tile an even break with their line they already had? Did you have any arrangement at all along that line?

A. No. I mean no contractual arrangement. Obviously, you are trying to get the other fellow out. You are doing the best you can——

Q. What sort of a tacit arrangement or what agreement did you have? I mean, obviously, you wouldn't give it to them without any [1148] arrangement.

A. There was no arrangement. As I told you a minute ago, actually one of the things that made Dick Howard's business grow and develop like it did was that at first they had the U.S.G. line and they had incombustible tile, a very good one. The second thing was their fibertile was the type with the slots in it, which was not too popular.

As you know, undoubtedly, the Celotex Company had a 17—had a patent on the drillboard for 17

(Testimony of Frank S. Harkins.)

years. It wasn't until the expiration of those old patents that anybody got into the drillboard business.

Actually, from Howard's standpoint with his incombustible tile being a very popular one and very essential part of his program, and the unpopular slotted tile, it was natural for him to take our good drill tile with holes in it.

Q. Didn't U.S. Gyp. put out——

A. Ultimately.

Q. After or before you gave them——

A. No, after.

Q. After you gave them Flintkote?

A. Oh, yes.

Q. Did you have any idea, Mr. Harkins, whether or not Howard sells more U.S. Gyp. board than he does Flintkote board, since 1951?

A. I have no way of knowing.

Q. Have you ever checked on sales or had a check made? [1149]

A. No, we never asked to get in their books. We have our own opinions, but——

Q. How about Coast?

A. Simpson hole board.

Q. Simpson had hole board as soon as you did?

A. Yes, they were in the business before we were.

Q. A long, quite a number of years before?

A. Not very many. The patent didn't expire until——

Q. '37?

(Testimony of Frank S. Harkins.)

A. Oh, no, no. About '46. Those drill patents only expired a few months, actually—see, the drilling machine went in to Hilo about the fall of '47. It took them about a year to get the machine made.

I would say those patents expired in '46.

Q. Well, since then was—I mean Coast was handling Simpson drill board? A. Yes.

Q. By that you mean the acoustical tile with the holes in it? A. Yes.

Q. So we will all understand. Do you have any idea whether Coast sells more Simpson tile than Flintkote tile?

A. Well, I have asked that direct question of Charlie and he said it was about 50-50. That is all I could go on.

Q. Was that sort of what you expected from Charlie? [1150] A. Well——

Q. Yes.

A. Yes. Although at times we did more than that. For example, Simpson got in a very rough strike one time and were out for many, many months.

Q. That wasn't Charlie's fault.

A. At that time we supplied all the requirements in the area.

Q. That is what you call a split line basis, the same company will handle U.S. Gyp. and Simpson, on the one side, and Simpson and Flintkote, on the other side, and then maybe Flintkote and Fir-Tex on the other.

(Testimony of Frank S. Harkins.)

A. Yes. In other words, they handle two lines.

Q. You know these complaints have been referred heretofore as rumors, Mr. Harkins. When these contractors called your attention in any manner to the operations of the plaintiffs in Los Angeles—I mean called Mr. Lewis' attention,—I mean Mr. Lewis called your attention to it?

A. Yes.

Q. You stated they wanted a meeting down at Flintkote office and you refused such a meeting.

A. I didn't say that.

Mr. Black: I don't know that he testified anything about the Flintkote——

The Witness: I didn't say that. [1151]

Q. (By Mr. Ackerson): Let's see. I thought my notes said you did.

You didn't testify that Krause wanted a meeting?

A. I said that Mr. Lewis had told me.

Q. Mr. Lewis had told you?

A. Mr. Lewis had told me when I came back from San Francisco that Mr. Krause had called and wanted to get together and discuss the aabeta activity in the City of Los Angeles.

Mr. Lewis said, "I told Mr. Krause, under no circumstances would we or any representative of the company attend any such meeting with the contractors."

Q. Isn't it so that Mr. Krause said, "Not I want to, Coast Insulating wants to," but also Howard and Hoppe or Sound Control? That is, "We want a meeting here"?

(Testimony of Frank S. Harkins.)

A. I can only quote what I remember Sid telling me. I don't know what Mr. Krause said.

Q. Anyway, Lewis told them that under no circumstances would you have such a meeting.

A. That is right.

Q. When you got back from Seattle——

A. I wasn't in Seattle. Ragland was.

Q. North, was it?

A. I was in San Francisco.

Q. San Francisco. Well, they both get mad at each [1152] other for that mistake.

Anyway, when you got back from San Francisco, Mr. Harkins, you called up Charles Newport.

A. Yes.

Q. And you went out to the Brown Derby for luncheon. A. Yes.

Q. You said, "Now, look, Charlie, I don't want to discuss this aabeta business with you and I don't want you to discuss it with me." Is that what you said? A. Yes.

Q. And that is all the conversation about aabeta, I take it, that happened at that luncheon?

A. Yes. You can continue with the rest of my statement where I said, "Charlie"——

Q. What else did you say?

A. I said, "We are not going to discuss it." I said, "We are going to investigate the situation. It is being investigated now. When the facts are all in we will make up our own minds what we are going to do. It will be for the good of The Flintkote Company. Now, let's get it clear."

(Testimony of Frank S. Harkins.)

Q. That was before Ragland got back, wasn't it?

A. No, Ragland got back, I think, the same day of this luncheon.

Q. You got back before Ragland did?

A. I got back Wednesday. [1153]

Q. Ragland got back on Friday?

A. I think on Friday.

Q. Lewis reported to you—Sid Lewis reported to you first—— A. Yes.

Q. ——immediately, I take it, when you got back?

A. Yes, when I walked in the door.

Q. Did Sidney Lewis tell you that he asked Baymiller to investigate it?

A. No. I will tell you what I think Sid said. He said that, "Under no circumstances would we or any representative of the company attend such a meeting," and Sid said, "I have told Baymiller to go out and call on Dick Howard, because Dick—" That is how we got in on the ground, was Browning— "I told Browning to go call on Dick Howard and see what all the shouting is about," or words to that effect. "I knew you would get hold of Mr. Newport."

Q. There had been some shouting?

A. The report was they were quite upset about this activity downtown.

Q. Otherwise, your luncheon meeting at the Brown Derby with Charles Newport, insofar as it pertained to the plaintiffs, was just a statement,

(Testimony of Frank S. Harkins.)

"Now, look, Charlie, don't discuss it; I won't discuss it with you. We are going to investigate [1154] it." A. That is correct.

Q. Did Mr. Lewis, when he first called your attention to these facts concerning the plaintiffs' business, have any telephone number to call—did he make any attempt to call the plaintiffs about it directly? Did he tell you he did? A. No.

Q. Did you ever make any attempt to call the plaintiffs in and talk to them about it directly?

A. No, I did not.

Q. You are positive that Thompson was in your office all the time this introductory meeting went on?

A. To the best of my knowledge, he sat right at my left all the time the meeting was going on.

Q. You are not positive. It has been testified that Mr. Thompson came in and introduced you and stayed a brief moment and went out.

A. I don't think that is correct. To my knowledge, I think he was there all the time.

Mr. Black: I don't think that is accurate, either.

Mr. Ackerson: I think that is what the plaintiffs testified. I am not talking about your clients.

Mr. Black: Maybe so.

Q. (By Mr. Ackerson): Now, do you have any knowledge about Flintkote, either through Mr. Ragland or your advertising department, consisting in anyway of the plaintiffs [1155] preparing their stationery and calling cards and so on?

(Testimony of Frank S. Harkins.)

A. That would be a normal procedure, but I don't have any knowledge of it.

Q. Mr. Black showed you this exhibit, Mr. Harkins, Defendant's Exhibit I, and attached to that is a calling card of Elmer Lysfjord.

Do you know where that card came from?

A. Well, it has the Flintkote seal on it. I presume we either gave him the dies or printed it for him; I wouldn't know.

Q. Was it on this exhibit when you examined it? A. Yes.

Q. It was there? A. Yes.

Q. Did you notice, Mr. Harkins, that here again on the calling card you have a Los Angeles telephone number and a San Bernardino telephone number?

A. Yes. That is actually where Ragland got the lead to locate the downtown warehouse, because, you see, there is no street address or anything on it, but there was a Los Angeles telephone number.

Q. He didn't call the telephone company——

A. He called this telephone number, if I remember his verbal report, and probably in here, too (indicating).

He called this telephone number, to see if he could find [1156] out where the so-called warehouse was.

Q. He didn't go down and knock on doors, did he?

A. He did, and came up with a carpet company, Abetter Carpet Company or Abetter Floor Com-

(Testimony of Frank S. Harkins.)

pany of some kind. Where he looked originally there was no aabeta——

Q. Down near the Bell Avenue address?

A. Some place in there. My recollection was he picked this card up at some general contractor's office and found the Los Angeles telephone number and called the number.

Q. What is your recollection on that, did Ragland tell you that? A. Yes.

Q. Are you sure of that?

A. That was in his verbal report to me.

Q. That is interesting, Mr. Harkins. When did he give you that verbal report? He gave you a verbal report and then a written report?

A. That is right.

Q. I believe this written report was submitted to you and you examined it somewhere around the date it bears? A. Yes.

Q. Mr. Harkins, let me ask you this: Was there any reason why you shouldn't have called these plaintiffs in, after you got this card, just called them into your office—you were their, really their bread and butter—and they [1157] would have come—was there any reason why you didn't just pick up the phone and say, "Lysfjord and Waldron, come in here, I want to talk to you"?

A. Yes, there was a very good business reason. We had an arrangement with these gentlemen to do business in San Bernardino. They had flagrantly violated it. They had opened the warehouse in town. Even the material shipped to San Bernardino had

(Testimony of Frank S. Harkins.)

been backhauled down here, because it was in the downtown warehouse.

They were out quoting all over this area and I said to the boys, "I don't think we have any option. I don't choose to do business with people that have abrogated the agreement so readily."

Q. Did you have any hesitancy in telling them if you felt that way? You still don't answer my question. Why didn't you pick up the phone and say, "Lysfjord and Waldron, I want to talk to you. Come down here. I want to tell you you have abrogated your agreement"?

A. I told Thompson to go tell them that. [1158]

Q. You told Thompson, Baymiller and Ragland to traipse out to the house and out to their plant and wait for them, didn't you?

A. No, I told them to go cancel the agreement.

Q. Well, that is the way they did it. You knew that, didn't you?

A. They went down to the house, didn't they?

Q. Yes, all three of them.

A. Did Ragland go too?

Q. Yes, sir.

A. I thought it was just Thompson and Baymiller.

Q. Now you did call Thompson, Baymiller and Ragland into your office and you told them to go down and cancel this agreement, didn't you?

A. I did not.

Q. You didn't call all three of them into your office?

(Testimony of Frank S. Harkins.)

A. They were all there, I mean, Mr. Thompson and Mr. Baymiller and Mr. Lewis were all present when we reviewed the facts of this case and reached the conclusion that we were going to remove them from the list of approved acoustical contractors and cease to sell them except on a termination basis.

Q. That was just shortly——

A. And I said to Mr. Thompson, "This is your job, you handle it." [1159]

The Court: We will have a short recess.

(Short recess.)

The Court: Proceed.

Q. (By Mr. Ackerson): At recess time, Mr. Harkins, I think I was asking you whether or not you called Ragland, Baymiller and Thompson into your office for a conference prior to having one or all of them go out to terminate the plaintiffs' source of supply. A. Yes.

Q. And I believe you said that you called Lewis and Thompson in. Did you call Baymiller in?

A. I don't know. I think, I am sure they were all there at this final discussion. Whether they called or my secretary called or whether Ed went to get them, I don't know.

Q. But all three of you were in there?

A. That is my recollection.

Q. And that would be Lewis, Thompson and Baymiller? A. Yes.

Q. Now did you at any time tell Thompson, Baymiller and Ragland to go down and do the job?

(Testimony of Frank S. Harkins.)

A. I did not.

Q. Before I forget it, you stated you were in business, in the materials field now, is that correct?

A. Yes.

Q. What building materials do you handle, Mr. Harkins? [1160]

A. The building materials of Pabco and Flintkote.

Q. So you are still related with the company in that manner. A. Related to both of them.

Q. And a part of your testimony on direct was that this finding out that the plaintiffs had a warehouse in Los Angeles caused a lot of commotion, is that right?

A. I don't think I said that. I think I said, Mr. Ackerson, that their activity when I got back from San Francisco apparently had created some commotion, according to the report I got from Mr. Lewis.

Q. Yes.

A. The physical finding of the warehouse down there was on our investigation and caused us no commotion. It was merely a part of the additional facts that we were getting.

Q. In other words, it was the fact that they were doing business? A. That is right.

Q. If they hadn't been doing business the warehouse would have made no difference?

A. (No response.)

Q. I have only a few other questions, Mr. Har-

(Testimony of Frank S. Harkins.)

kins. Did you testify that neither Newport, Krause, Howard nor Hoppe ever came to the Flintkote offices while you were there that you know of in connection with this matter? [1161]

A. Not that I know of. I said they were not in my office and not in the building to my knowledge when I was there.

Q. But you have a private office, or you had a private office, did you not? A. Yes.

Q. And Mr. Thompson had a private office?

A. Yes.

Q. Did Mr. Baymiller?

A. Yes, right alongside.

Q. Ragland did not? A. No.

Q. Now you made an interesting statement, if I recall it. You said that when you got back from San Francisco and was told by Mr. Lewis that these activities of the plaintiffs in Los Angeles, that you did something—I believe you said you called Thompson in to discuss the matter?

A. I don't recall that I said that, Mr. Ackerson. I think I talked to Sid and he went on with his story about the request that he had had to attend the meeting or get a meeting together and he had rejected the idea, and I said, well, that is perfectly correct.

Q. I see. But later you did, didn't you? You called Thompson or somebody else in, I believe?

A. Undoubtedly later, Mr. Ackerson. I talked to Mr. Thompson, Mr. Baymiller, Mr. Lewis and Mr. Ragland, and we [1162] assigned Mr. Ragland to

(Testimony of Frank S. Harkins.)

the problem of investigating some of the stories to see what we could find out.

Q. But you didn't know that Mr. Baymiller—you did say that you knew that Mr. Baymiller had himself made an investigation?

A. I knew that Mr. Lewis told me, as I recall it, in that same conversation that he had sent Mr. Baymiller over to see Mr. Howard, and that he said I knew you would see Mr. Newport.

Q. Did he say that he had also sent Mr. Baymiller over to see Mr. Newport? A. No.

Q. Did he say that he had also sent Mr. Baymiller over to see Mr. Hoppe?

A. Not that I recall. He most likely did in that conversation.

Q. I am not quite certain of this statement of yours—you can correct me if you wish and we will let the record decide tomorrow—but I understood you to say that you called these people in to talk to them to satisfy your own mind about this territory question. Did you say that?

A. Yes. I didn't say when.

Q. No, you didn't say when, but you called Ragland or Baymiller or some of them in to satisfy your own mind where these people would operate? [1163]

A. Yes. I went over it with Mr. Thompson and Mr. Baymiller very carefully, the various discussions they had had with these people and the luncheons they had had, and what their definite under-

(Testimony of Frank S. Harkins.)

standing was or had been before they brought them into my office for them to make the deal. [1164]

Q. In other words, you wanted to clarify your own mind on it, is that right?

A. I wanted to be sure, yes.

Q. All right.

The Court: Did you ever have a written memorandum of any kind with these plaintiffs, regarding the area in which they were to distribute your products?

The Witness: No, sir, not in writing.

Q. (By Mr. Ackerson): So that, I take it then, Mr. Harkins, that the investigation made was one investigation that was made by Mr. Baymiller, and you had a conversation with Mr. Newport about this same subject matter of the plaintiffs' business in California, and then Ragland was delegated by you to investigate? A. That is correct.

Q. And on top of that Lewis had received these communications and transmitted them to you, that is, communications from the contractors?

A. That is correct.

Q. All of those things happened? A. Yes.

Q. Now, did you say in your direct examination, in connection with your luncheon at the Brown Derby with Mr. Charles Newport, that whatever decision Flintkote made would be in Flintkote's best interests? Didn't you say that? [1165]

A. Yes.

Q. Now, I have only one more general question. Why, Mr. Harkins, in place of all the conferences,

(Testimony of Frank S. Harkins.)

investigations and so forth, if the plaintiffs were not supposed to operate in Los Angeles, why didn't you call them up and tell them so or write them a business letter terminating the deal? You were the top boss. Why didn't you do that?

A. I don't think that that has any great bearing on the thing, Mr. Ackerson.

Q. Can you answer the question?

A. Yes. Why didn't I? Because it is Mr. Thompson's district. He is the district manager.

Q. Why didn't you have Mr. Thompson call them in or write them a letter and say, "You have violated your agreement. We can no longer sell you"?

A. Generally speaking, there is no written contract with anybody, in the first place. Generally speaking, I would prefer to have the people themselves who made the negotiations and carried on the negotiations go down and terminate the negotiations.

Q. Did it occur to you, Mr. Harkins, that maybe, along the line you just stated, that you might, since you listened to the contractors' complaints, that you might have given these plaintiffs a hearing along the same line, the same philosophy you have just spoken? [1166]

A. No, it was a simple matter with me, Mr. Ackerson, whether or not they were operating in accordance with the agreements and understandings we had or they weren't. We assured ourselves they were not, and I asked to have the thing terminated.

(Testimony of Frank S. Harkins.)

Q. The only question was whether or not they were operating in Los Angeles, wasn't it?

A. That is correct. They could have stayed in San Bernardino.

Q. That was the only question you were involved with? A. Yes.

Q. Why didn't you ask them whether they were —there was never any denial when Bob Ragland got down there——

A. Mr. Ackerson, I didn't have any of the personal negotiations with the people, from the start to finish. I had probably a 15 minutes' conversation. It was strictly a Los Angeles district sales matter.

Q. Why didn't you have Mr. Thompson do it? You delegated him. Why didn't you ask Mr. Thompson to call them up? Why didn't you do that?

A. To ask them if they had a warehouse?

Q. Ask them if they were operating, whatever you wanted to know about their Los Angeles operation. Why didn't you have Mr. Thompson do that?

A. We established that fact, sir.

Q. Why didn't you establish it the simple way? [1167]

A. That is a matter of judgment.

Q. Isn't it a fact, Mr. Harkins, after this commotion you were talking about you had to have some excuse to fire them? A. No.

Q. Let me ask you about this purported report of Ragland's, the written report after the oral report.

In this report, and I call your attention to the

(Testimony of Frank S. Harkins.)

fact you just stated the sole question was whether they were operating in Los Angeles, is that correct?

A. That is correct.

Q. Why were you interested? Why did Mr. Ragland report to you that—I am reading paragraph 4 of his report—and I will show it to you——

"The aabeta co. has not sold the Lewis Downer Company of Riverside any Flintkote tile to be installed on the Orange Coast College job."

What did that have to do with aabeta co.'s operating in Los Angeles? What has that to do with it?

A. I have no idea.

Q. Let me call your attention to something else. Apparently Flintkote had an inquiry from the Stanton Lumber Company about a bad check of aabeta. What did that have to do with the question you were interested in? A. Not a thing. [1168]

Q. There is another paragraph here. No. 3.

"Mr. Waldron resigned his position as salesman of the R. W. Downer Company right after the first of the year. He did not abscond with Downer Company job files and was not fired for inefficiency. His rate of pay was in the neighborhood of a thousand dollars per month. This pay was strictly derived from commissions."

What did that have to do with their operation in Los Angeles, Mr. Harkins?

A. Nothing at all.

Q. Did you request Mr. Ragland to run down these items?

A. I never heard of them until I saw that report.

(Testimony of Frank S. Harkins.)

Q. You read the report? A. Yes, sir.

Q. And you say you read it on February 15th or thereabouts? A. Or thereabouts.

Mr. Ackerson: That is all.

Mr. Black: I just have one or two questions. [1169]

Redirect Examination

By Mr. Black:

Q. On cross-examination, Mr. Harkins, counsel commented to the jury but didn't ask you about this page of the report about schedules and estimated projected policy. You will observe that the top of the page shows aabeta company, Los Angeles, California. Did you observe that address at the time, or do you remember?

A. No. I don't recall ever having seen the specific address. I don't think it would have struck me if I had.

Q. Why not?

A. Because they had no place of business yet anyhow.

Q. Now on this Convair job at Pomona, I think you said that your company and you did not know about that job at the time.

A. We were well aware of it.

Q. What was your information with respect to the requirement of the specifications for acoustical tile in that construction?

A. The specifications originally came out calling for a hundred per cent incombustible material.

(Testimony of Frank S. Harkins.)

Q. Does Flintkote manufacture any incombustible material? A. No.

Mr. Black: That is all. [1170]

Recross-Examination

By Mr. Ackerson:

Q. Do you deny, Mr. Harkins, calling that job to the attention of the plaintiffs when they were in your office in this introductory meeting?

A. Yes, I deny—I don't deny that I did. I said I had no knowledge of it. I don't recall discussing the Convair job with them at all.

Mr. Ackerson: That is all.

Mr. Black: Thank you, Mr. Harkins.

(Witness excused.)

Mr. Black: I will call Mr. Heller.

ROBERT WILLIAM HELLER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please.

The Witness: Robert William Heller.

Direct Examination

By Mr. Black:

Q. What is your present occupation, Mr. Heller?

A. I am a salesman for Fibreglass Engineering and Supply Company. [1171]

(Testimony of Robert William Heller.)

Q. How long have you held that position?

A. Since March of this year.

Q. Where were you employed prior to that time?

A. With The Flintkote Company.

Q. In what capacity?

A. In sales promotion on the Canec line of insulating products.

Q. How long did you hold that position with Flintkote?

A. From January, 1949, until February of this year.

Q. Continuously? A. Yes, sir.

Q. In general, what was the nature of your duties?

A. To work with the factory in the development of insulating products, that is, the factory at Hilo, and to supply the necessary technical data and advertising data to the salesmen in the field so that they could do a sales job.

Q. Did you have any contacts with the plaintiffs in this case or either of them?

A. Yes, on two different occasions.

Q. What was the first occasion?

A. The first occasion was in the office of The Flintkote Company. The plaintiffs were in the accompaniment of Bob Ragland, and Bob Ragland stopped me as I was passing through the office and introduced me to the two gentlemen, and told me that they were going to handle acoustical products [1172] in San Bernardino County.

Q. About when was that, if you can recall?

(Testimony of Robert William Heller.)

A. I can't recall the date.

Q. That was just an introduction?

A. Essentially so, yes. We talked there in generalities for a few moments and Mr. Ragland went on to explain to them that in case they needed any help at the office in ordering, and so forth, their products, that I was available to them there and would do what I could to help them.

Q. Nothing else of a business nature was transacted at that meeting? A. No, sir.

Q. When was your next contact with the plaintiffs?

A. The next contact was on the occasion of the delivery of the first shipment of Flintkote acoustical tile to the aabeta company's warehouse in San Bernardino.

Q. With whom did you go, if anybody, on that trip?

A. Mr. Ragland and I went out to San Bernardino for another purpose, to inspect an insulating tile job that was going on, and while we were there we went over to the warehouse of aabeta.

Q. Whom did you see on that occasion?

A. Mr. Waldron was there at the warehouse.

Q. Did you observe the tile being discharged from the automotive equipment? [1173]

A. Yes, sir. There was, as I recall it, a Water-Land truck there unloading acoustical tile in this warehouse.

Q. Did you have any idea how many pieces of motor equipment you saw?

(Testimony of Robert William Heller.)

A. As I recall it, there was a large truck and a trailer.

Q. Did you have any extended discussion with the plaintiffs on that occasion?

A. Only in generalities, as far as establishing the business there in San Bernardino. Mr. Waldron at that time was busy engaged in fixing up an office in the front of this warehouse, and we talked briefly about that, nothing as far as the operation of the business is concerned.

Q. What was the next occasion you had to have any business contact with any of the aabeta operations?

A. Well, that is the only time that I recall having had any direct contact with aabeta.

Q. Did you have any occasion in connection with Flintkote's business to do anything that related to aabeta or aabeta's operations?

A. Not that I recall.

Q. Did you have anything to do with talking to distributors of products of The Flintkote Company with reference to aabeta?

A. Well, I did go out to Coast Insulating Products Company [1174] in the accompaniment of Mr. Baymiller one afternoon, and we talked there with Mr. Krause and Mr. Newport in Mr. Newport's office.

Q. And what, if anything, do you recall that was said generally at that meeting?

A. Well, both Mr. Krause and Mr. Newport were

(Testimony of Robert William Heller.)

quite upset over the fact that Flintkote Company was selling aabeta. [1175]

Q. What, if anything, was said by you or Mr. Baymiller on that occasion?

Mr. Ackerson: Before the question is answered, this time, Your Honor, I am going to object to it as hearsay.

Mr. Black: Well, if the Court please, this has to do with the issue of the motives of the defendant in this case, what it was actuated by in its action with respect to the plaintiffs, whether or not there were threats or boycott language or anything of the sort.

We are not using it in the hearsay sense. We submit it is not hearsay. It is part of the transaction that is under challenge in this lawsuit.

Mr. Ackerson: It is talking about conversations. I still thing it is hearsay, Your Honor.

The Court: You are not trying to prove the facts related in the conversation.

Mr. Black: Certainly not.

The Court: Overruled.

Q. (By Mr. Black): What was said at that meeting by you or Mr. Baymiller, if you remember?

A. I can tell you, as I remember the conversation.

Q. That is what I am talking about.

A. Mr. Crouse and Mr. Newport were upset because Flintkote was selling aabeta. They said that they had been working in the San Bernardino area there in solicitation of [1176] acoustical tile work,

(Testimony of Robert William Heller.)

and that they had intended to open up a branch office in that area, to properly service the accounts.

Q. What did you or Mr. Baymiller say on that occasion?

A. Well, both Mr. Baymiller and I said that the decision was not with us, we did not have the authority to make a decision as to whether the Flintkote Company sold aabeta or not. That that decision would have to come from Mr. Harkins.

Q. At that time was there any threat made by Mr. Crouse and Mr. Newport about boycotting the Flintkote Company if they did not discharge these people?

Mr. Ackerson: Objected to as calling for a conclusion.

Q. (By Mr. Black): Was there anything said about boycotting? A. No.

Q. Was there anything said about terminating relations with The Flintkote Company if that was not done by The Flintkote Company, with respect to the plaintiffs? A. No.

Q. Did Mr. Newport state that he would spend forty or fifty thousand dollars to see to it that not another foot of Flintkote tile was sold in this area if Flintkote did not discharge the plaintiffs?

A. I did not hear that.

Q. Did you ever hear of any such statement?

A. No, sir. [1177]

Q. What else did you hear on that occasion?

A. Well, after we left Coast Mr. Baymiller and I went over to the offices of Sound Control.

(Testimony of Robert William Heller.)

Q. Whom did you see there?

A. We went to Sound Control and went in Mr. Hoppe's office, and Mr. Hoppe was there, Mr. Howard, Dick Howard, was there, and I believe Mr. Tomlinson of Sound Control was there.

Q. What, if anything, was said by these people, if you remember, at that meeting?

A. Mr. Hoppe was upset, of course, that Flintkote Company was selling aabeta.

He said that he felt that we should have consulted him about appointing another acoustical contractor in the Southern California area, before selling an additional account.

Q. What did you say, if anything?

A. I told Mr. Hoppe that we did not have the authority to make any decisions, as to who was or who was not to be appointed as an acoustical tile contractor.

Q. Do you recall anything else that bears on this thing at that time?

A. Mr. Hoppe then, to continue that conversation, Mr. Hoppe wanted to know who was in charge at The Flintkote Company, that he could talk to.

Q. And what did you say? [1178]

A. We told him that Mr. Harkins was. And he said he would like to talk to Mr. Harkins.

Q. Did either Mr. Howard or Mr. Hoppe state that they would stop doing business with Flintkote if aabeta were not discontinued?

A. No, sir.

Q. Did you have any notice or knowledge of any

(Testimony of Robert William Heller.)

plan or scheme among the acoustical tile contractors to allocate bids in the Los Angeles area?

A. No, sir.

Q. Or in the same connection to fix prices?

A. No, sir.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Did you also go out with Mr. Baymiller to the Howard Company? A. No, sir.

Q. In other words, when you got out to Mr. Hoppe's you found Mr. Howard there, is that it? Is that R. E. Howard?

A. That is right, sir, he was.

Q. He was at Hoppe's business then?

A. That is right.

Q. The two of you talked to both of them, both Howard and Hoppe, did you? [1179]

A. Mr. Howard was present.

Q. What did Mr. Howard have to say, about the same thing?

A. Mr. Howard, to my knowledge, did not make any comment.

Q. Now, Mr. Heller, do you know whether Mr. Baymiller went out to the Howard Company that same day? A. No, sir.

Q. Do you know whether he ever went out there?

A. No, sir.

Q. But you attended Mr. Baymiller when he

(Testimony of Robert William Heller.)

went out to Sound Control and there you met both Hoppe and Howard? That is who you had your conference with, you stated? A. That is right.

Q. Mr. Hoppe, I believe you said, talked about Sound Control was going to put a branch office in San Bernardino? A. No, sir, that was——

Q. Howard? A. No, sir.

Q. Who was that?

A. That was Coast Insulating.

Q. Coast. That was Mr. Newport?

A. Mr. Crouse made that statement.

Q. Mr. Crouse. So that when you and Baymiller got out to Coast Insulating you not only found Mr. Newport but you found Mr. Crouse there, too, is that right? [1180] A. That is right.

Q. And the conference, rather than being just with Newport, was with both Crouse and Newport, is that right? A. That is right. [1181]

Q. Do you know whether or not Mr. Baymiller took any other trip out to Sound Control where he just saw Mr. Newport?

A. I don't think Mr. Baymiller ever saw Mr. Newport in Sound Control. Mr. Newport is at Coast Insulating.

Q. I mean Coast. Thank you. Do you know whether Mr. Baymiller ever took any other trip out there for this same purpose when you weren't there? A. No, sir, I do not.

Q. Do you know whether Mr. Hoppe ever had his conversation with Mr. Harkins that he requested? A. I couldn't answer that.

(Testimony of Robert William Heller.)

Q. But he did request it? A. He did.

Mr. Ackerson: That is all.

Mr. Black: That is all.

(Witness excused.)

Mr. Black: Call Mr. McAdow.

HAROLD H. McADOW

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Harold H. McAdow, M-c-A-d-o-w.

Direct Examination

By Mr. Black:

Q. What is your occupation, Mr. McAdow?

A. Credit manager.

Q. For what company?

A. For the Flintkote Company.

Q. How long have you held that position?

A. Since 1948.

Q. Continuously? A. Yes.

Q. What contact in that connection, if any, did you have with the plaintiffs in this case?

A. Mr. Ragland brought the plaintiffs in to me with a financial statement for the purpose of purchasing a carload of acoustical tile on credit.

Q. Did you examine the financial statement?

A. Yes, I did.

Q. I show you, Mr. McAdow, Plaintiffs' Exhibit

(Testimony of Harold H. McAdow.)

44 and ask you if that is the document to which you refer?

A. (Examining document): Yes.

Q. Can you place the time when that meeting took place?

A. I would say it was in December of '51.

Q. Attention has been called, Mr. McAdow, in this case to the fact that this statement shows the aabeta company, Los Angeles, on the cover and one of the inside pages. Do you [1183] recall whether or not you particularly observed that at the time you saw the financial statement?

A. I didn't particularly observe it, no sir.

Q. Did you call it to anyone's attention at the time?

A. You mean the Los Angeles name?

Q. Yes. A. No.

Q. What, if anything, did you do with respect to the credit of the plaintiffs in connection with their order for tile?

A. Well, when they were brought in they were introduced and I was given this statement and we talked about their plans for starting a new business, acoustical tile contractors, in San Bernardino, and they stated that they wanted to buy an opening order of a carload of acoustical tile for delivery to San Bernardino, and we discussed the payment terms and we agreed, after this examination, and the history of their experience and all, that we would permit them to our regular terms on this first purchase of acoustical tile with the understand-

(Testimony of Harold H. McAdow.)

ing that they pay for it and discount the invoice when it was due.

Q. Was there anything said by the plaintiffs or either of them on that occasion about doing business in Los Angeles? A. No.

Q. Or by you? [1184] A. No.

Q. Did you have any further contact with the plaintiffs?

A. I might have had a contact with them, I don't recall exactly. They might have brought in a check in payment of the order. I believe I discussed later a purchase over the telephone with them. That is about it.

Q. And that is about all you recall on this matter? A. Yes.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. What time do you place this meeting—this is the same meeting when they were introduced to Mr. Harkins, wasn't it? A. I believe so.

Q. This was the same meeting when they were notified that they were going to get a line of Flintkote tile, is that right?

A. We discussed whether or not their first order could be purchased on credit terms.

Q. They didn't present any order then, did they?

A. Not at that time.

Q. But it was this same meeting, was it not,

(Testimony of Harold H. McAdow.)

when they were introduced to Mr. Harkins for the first time? You said they were introduced to Mr. Harkins. [1185]

A. I assume that it was the same day. I didn't know they had been in to talk to Mr. Harkins. Mr. Ragland brought them in to me.

Q. Mr. Ragland brought them in to you, not Mr. Thompson? A. Yes.

Q. Where were they when Mr. Ragland brought them in to you? Did he bring them in to you from Mr. Harkins' office?

A. I don't know. They came in from the outside of my office. That is all I know. I don't know what direction they came in from.

Q. You don't know where they came from?

A. No.

Q. But it wasn't Thompson or Baymiller that brought them in? A. It was Mr. Ragland.

Q. You say this meeting was some time, what, the first part of December or the latter part of December or what?

A. As I recall, it was the latter part of December.

Q. Could it have been in November?

A. I don't believe it was.

Q. Do you know when they placed their first order?

A. You must have a ledger sheet around here some place that shows that. I mean, that would be the conclusive evidence of when they placed it. [1186]

(Testimony of Harold H. McAdow.)

Q. They didn't place an order that day, though, did they? A. No, not to my knowledge.

Q. You say they merely inquired about financing a future order? A. That is right. [1187]

Q. Did they say they had any place to have it delivered or anything?

A. They were talking about a place, a warehouse, I believe, in San Bernardino.

Q. You believe that?

A. That was just mentioned in the discussion.

Q. Did they give you an address?

A. Not at that time, no.

Q. Did they say they had a place there?

A. I believe they were negotiating for a warehouse at that time.

Q. They were negotiating? A. Yes.

Q. Did they say anything about a place in Los Angeles they had at that time? A. No.

Q. Did they say they had any place at that time?

A. I don't recall that they did.

Q. You say Mr. Ragland called up and said, "Mr. McAdow, I want you to meet Mr. Lysfjord and Mr. Waldron. They are going to distribute our tile in San Bernardino," is that your statement?

A. Yes.

Q. Did they say anything about Los Angeles?

A. No. [1188]

Q. In other words, I take it, they didn't state they were not going to distribute it in Los Angeles, too, did they?

(Testimony of Harold H. McAdow.)

A. There was no question, San Bernardino was the only place that was mentioned.

Q. You were shown that exhibit, Plaintiffs' Exhibit 44, Mr. McAdow. Did you see that exhibit before or after Mr. Harkins did?

A. I don't know.

Q. Did you examine the exhibit carefully as a credit manager down there?

A. I looked it over, yes.

Q. You stated you didn't see either of the two places where Los Angeles appears on it?

A. I made no special note of it at that time, because they had no place of business.

Q. They had no place of business you knew of at that time then?

A. They couldn't have had if they were negotiating for a place of business.

Q. They couldn't have had if they were just notified that today they could get tile, either, could they? A. Will you repeat that?

Q. Ordinarily, they wouldn't have had a place of business, would they, if they just had been notified a minute [1189] or two before they were going to get some Flintkote tile?

A. I don't follow your question.

Q. I will withdraw it. I don't blame you. But you say San Bernardino was mentioned?

A. Yes.

Q. You are credit manager and a pretty careful one, aren't you? You have been described as a pretty cautious man here. A. Thank you.

(Testimony of Harold H. McAdow.)

Q. Are you? You examined this very carefully as a cautious man, did you?

A. I read it over, yes.

Q. I take it it was your understanding they were just going to operate in San Bernardino, wasn't it?

A. That is right.

Q. You mean to say you looked this thing over and didn't see this address here and you didn't see this one over here (indicating) on their prognosis of their future operations? You didn't see either of those?

A. I made no particular note of the Los Angeles. They gave their residence addresses, they were both living in Los Angeles.

Q. Yes, but that appears two other places. That is aabeta co., Los Angeles, both of the places I am calling to your attention. You didn't notice that? [1190]

A. No, I made no particular note of it.

Q. If you had noticed it, I suppose you would have notified Mr. Harkins these people were in the wrong bailiwick, wouldn't you?

A. They hadn't started their operations in San Bernardino at that time.

Mr. Ackerson: That is all.

(Testimony of Harold H. McAdow.)

Redirect Examination

By Mr. Black:

Q. One question further, Mr. McAdow. Referring to the financial statement, the very first page, I will call your attention to the fact it states, "Statement of financial condition as of December 1, 1951."

Does that help you with respect to the date of this in connection with counsel's suggestion that it might have been November?

A. Yes, I think that establishes it would have to be after December 1st, yes.

Mr. Black: That is all.

(Witness excused.)

Mr. Black: I will call Mr. Krause.

The Court: You have taken the oath here once, haven't you?

Mr. Krause: Yes.

The Court: That oath still applies. [1191]

Mr. Black: Still a good oath.

The Court: Is this going to be extended testimony?

Mr. Black: I don't think it will be very long on direct. I suspect it might be longer on cross.

The Court: Let's go to the direct then.

GUSTAV KRAUSE

called as a witness by the defendants, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Black:

Q. Mr. Krause, what is your present occupation?

A. I am manager of the acoustical and insulating departments of Coast Insulating Products.

Q. How long have you been acting in that capacity?

A. When I came to Coast Insulating in July of 1950, I was the manager for that company.

Q. And have you remained continuously with that company, to the present time?

A. Yes, sir.

Q. Is Mr. Newport connected with that company now? A. No, sir.

Q. When did he sever his connections with the company?

A. He sold out his company in March of 1954.

Q. Where is Mr. Newport now?

A. I believe he is in Europe. [1192]

Q. What kind of tile does Coast Insulating Company carry?

A. They carry two lines, Simpson acoustical tile line and the Flintkote line. [1193]

Q. Was that true in the summer of '51 through the spring of '52? A. Yes, sir.

Q. What was the occasion when you first learned of the activities of Messrs. Lysfjord and Waldron

(Testimony of Gustav Krause.)

in business as aabeta company in the Los Angeles area?

A. One of my salesmen reported to me that we had lost a job to the aabeta company and I believe the general contract was Contracting Engineers. It was a market job.

Q. When was that, if you can recall?

A. 1951, I believe. I don't know the exact date?

Q. Could it have been the spring of 1952?

A. It was during the time, right after that when the aabeta company, I found out, had the acoustical line for Flintkote, so whatever date that was would tie in with it.

Q. What, if anything, did you do in connection with this, Mr. Krause?

A. As I recall the job, it was a Flintkote specification, and our people had been working on the job, and I immediately got on the phone and called the Flintkote people up because it was my understanding that they took the job on a Flintkote specification.

So I contacted the Flintkote office and tried to get in touch with Bob Ragland, and he was out of town, so I got hold of Sid Lewis, and I said, "Mr. Lewis, have you opened [1194] another acoustical contractor in the Los Angeles area, or what is happening around here?" It was my understanding that there were three acoustical contractors, and we ended up with aabeta company, which is a new company, and I didn't even know who they were actually, with the Flintkote line.

(Testimony of Gustav Krause.)

So then Mr. Lewis informed me in no uncertain terms that they had opened up a new acoustical contractor but not for the Los Angeles area, they had opened up an acoustical contractor called the aabeta company for San Bernardino and Riverside Counties.

And I said, "Well, we are working out in San Bernardino and Riverside and it was my understanding from the Flintkote Company that there would be three acoustical contractors for Southern California." Naturally I was upset to find we had other competition in the market.

Q. What did Mr. Lewis say to you in response to that?

A. Well, he became quite heated. I was rather amazed to find that we were customers and to have our manufacturers jump through the telephone at us, and it ended up by his telling me to go to hell. I will never forget that. I know that to be a fact.

Q. Did you have any further discussion with Mr. Lewis on that occasion or did you call him back or what happened?

A. I don't recall having any further discussion with him on that occasion. [1195]

Q. Well, did Mr. Lewis say, politely or otherwise, that the matter would be investigated or something of the sort, or something would be done by Flintkote in the way of finding out what the facts were?

Mr. Ackerson: If Your Honor please, I haven't objected to leading questions for a long time, but I

(Testimony of Gustav Krause.)

think this is leading and I will object to it. I want the witness to answer.

Mr. Black: It might well be. I will put it this way——

The Court: Rephrase it.

Q. (By Mr. Black): Was anything said by Mr. Lewis with respect to what the company's actions would be, if any?

A. No, the only thing Mr. Lewis said that the Flintkote Company had the right to open up or close down any distributor that they wanted to.

Q. Did you make any further request at that time of Mr. Lewis?

A. No, I decided that it was time for me to cool off and wait until Mr. Ragland got back in town to find out what the entire story was.

Q. Did you later have any discussions with the Flintkote people or any of their employees?

A. Yes, sir.

Q. When? [1196]

A. I believe when Mr. Ragland—I don't know the exact date; it was right during that period—when Mr. Ragland came back, I had left a message for him to call me and he came over and called on me at my office, and I said, "Bob, what is it? What have you done? Why have you opened up another acoustical contractor when it was the understanding of me, and I believe the other two, Flintkote acoustical contractors that there would only be three acoustical contractors in the area?"

And he said, "Well, the Flintkote Company de-

(Testimony of Gustav Krause.)

cided that they needed a new contractor in San Bernardino and Riverside area and both Walter Waldron and Elmer Lysfjord were the type of people to handle that area."

I said, "Fine, but why didn't you tell us about it? At least we should know that that is going to happen."

And I recall very vividly giving the example that if I had a board franchise or distributorship on one street corner and had had it and worked at it for many years in trying to build up my business, and then the Ford Motor Company opened up another distributor right across the street from me, which in effect that is the way it was, why naturally I would be awfully upset. I think that is a prerogative of every businessman.

Q. What did Mr. Ragland say to you?

A. He was very upset, the same as I was, and he said, [1197] "Well, the only thing we can do," he said, "is if Waldron and Lysfjord are bidding in the Los Angeles area we will have to check into it," and he said, "our agreement was for them to bid in San Bernardino and Riverside Counties only."

Q. Did you have any further discussions with any other Flintkote representatives on this score?

A. Shortly after that both Mr. Baymiller and Bob Heller came to our office. At that time I happened to be there——

Mr. Ackerson: Your Honor please, I want a continuing objection to this line of testimony between alleged co-conspirators as hearsay.

(Testimony of Gustav Krause.)

The Court: Overruled.

Q. (By Mr. Black): You may proceed, Mr. Krause.

A. What was your question?

Mr. Black: Read it, Mr. Reporter.

(The question referred to was read by the reporter as follows: "Q. Did you have any further discussions with any other Flintkote representatives on this score?")

The Witness: Well, shortly after that both Mr. Baymiller and——

Will you read that again?

(The question referred to was reread by the reporter as follows: [1198] "Q. Did you have any further discussions with any other Flintkote representatives on this score?")

The Witness: Do you mean employees of The Flintkote Company?

Mr. Black: Yes, sir.

The Witness: Yes, shortly after that Mr. Baymiller and Mr. Heller came to our office, and I happened to be there at the time, and they came unannounced, and Mr. Baymiller, during the conversation, lost his temper in Mr. Newport's office and said that The Flintkote Company had a right to their own business and they could handle or see fit to give out any distributorship, franchises, or take any away that they wanted. And Mr. Baymiller and Mr. Newport both parted feeling pretty hot. [1199]

(Testimony of Gustav Krause.)

Q. Did Mr. Newport state at that occasion that if Flintkote didn't discharge these people he would stop doing business with Flintkote?

A. Knowing Mr. Newport as well as I do for many years, I don't think——

Mr. Ackerson: Your Honor please, I object to that.

Mr. Black: That is perfectly correct.

Mr. Ackerson: That is non-responsive.

Q. (By Mr. Black): The question was did he or didn't he? A. What was the question?

Q. The question was whether Mr. Newport stated on that occasion that if Flintkote did not discharge these plaintiffs Mr. Newport would stop doing business with Flintkote. A. No, sir.

Q. Do you recall Mr. Newport ever saying, in your presence, that if Flintkote did not discharge these plaintiffs he would spend forty or fifty thousand dollars to see to it that not another foot of Flintkote tile was sold in the Los Angeles area?

A. No, sir.

Q. Did you ever hear of his making such a statement? A. No, sir.

Q. Did you personally state at any of your discussions with the Flintkote people that if they didn't discharge these [1200] people you would boycott them? A. No, sir.

Q. Did you ever hear the word "boycott" used in that connection? A. No, sir.

Q. By any of your employees? A. No, sir.

(Testimony of Gustav Krause.)

Q. Did you attend any meeting of the acoustical tile contractors dealing in Flintkote products relating to this aabeta situation? A. No, sir.

Q. To the best of your knowledge, was there any such meeting?

A. The only meeting that I know of was the meeting between Mr. Baymiller and Mr. Heller, Mr. Howard and Mr. Hoppe in Mr. Hoppe's office.

Q. You weren't there personally?

A. No, sir, I was not there.

Q. That is the only one you heard of, is that it?

A. Yes, sir.

Q. You don't know anything about that?

A. I don't know anything about the meeting.

Q. No representative of your company was present? A. No, sir.

Q. Did you have any further discussions on this subject [1201] with the Flintkote people, that you recall?

A. Well, from time to time I would say that I thought they had a vacillating sales policy, usual needle.

Mr. Ackerson: I don't like to keep interrupting here.

Q. (By Mr. Black): I mean with relation to aabeta's activities. A. No, sir.

Q. You have told me everything you can recall of that particular subject relating to activities of the aabeta co.?

A. From time to time the aabeta co. was taking jobs in the Los Angeles area.

(Testimony of Gustav Krause.)

Q. I am talking about conversations you had with the Flintkote people about the presence of aabeta co. in the Los Angeles area.

A. No, sir.

Q. You have told me everything you can recall?

A. Yes.

Q. You don't have any other recollection of any other meetings or discussions or conferences?

A. I don't recall any.

Q. Did you at any time during this period have anything to do with any arrangements between the acoustical tile contractors on the subject of trading jobs—— A. No, sir.

Q. ——particularly public jobs? [1202]

A. No, sir.

Q. Or the matter of agreement to fix prices?

A. No.

Q. Did you ever tell any of the Flintkote people that such an arrangement existed in this area?

A. No, sir.

Mr. Black: You may cross-examine.

The Court: Further trial of this case is continued until Monday at 10:30.

(Whereupon, at 4:10 o'clock p.m., Friday, May 20, 1955, an adjournment was taken to Monday, May 23, 1955, at 10:30 o'clock a.m.) [1203]

Monday, May 23, 1955—10:30 A.M.

The Court: The jury and alternates being present, you may proceed.

Mr. Black: Your Honor please, Mr. Ackerson has graciously consented I may call a short witness out of order. He has to be in Pomona this afternoon. His testimony will be very brief.

The Court: All right.

Mr. Black: Mr. Cannon, please.

The testimony, not the witness, will be short. That is what I meant.

The Court: Every lawyer says that.

ROGER W. CANNON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, sir?

The Witness: I am Roger W. Cannon.

Direct Examination

By Mr. Black:

Q. This is a large room, Mr. Cannon, and I ask you to please speak good and loud, so we can hear you.

What is your occupation, Mr. Cannon?

A. I am an engineer. [1205]

Q. For whom do you work?

A. I am employed by Jackson Brothers, contractors.

(Testimony of Roger W. Cannon.)

Q. How long have you been so employed?

A. Fourteen years.

Q. In that connection, do you have occasion to let subcontracts for acoustical tile work?

A. Yes, sir.

Q. Was that true in the period 1951 and prior thereto, and running continuously through 1952?

A. Yes, sir.

Q. Do you recall a series of acoustical tile contracts that were made with the R. W. Downer Company some time in the fall or early spring of '51—fall of '51 or early spring of '52? A. Yes, sir.

Q. Did you personally deal with those subcontracts? A. Yes, I did.

Q. What was the date of your negotiations or the letting of the bid on that, if you know?

A. August of 1951 or thereabouts.

Q. And speaking generally, without going into close detail, what was the nature of that work?

A. It was the letting of the installation of acoustical tile ceilings in various buildings we had under construction. [1206]

Q. And where in general were those buildings located?

A. In various locations, but principally Southern California and principally in Los Angeles County, although there were one or two jobs in other locations.

Q. Who was the successful bidder on that job?

A. On the particular jobs that I believe you are referring to it was the R. W. Downer Company.

(Testimony of Roger W. Cannon.)

Q. With whom did you deal as a representative of the R. W. Downer Company, Mr. Cannon?

A. I dealt with a Mr. Lysfjord principally.

Q. And do you recall the circumstances under which that contract was made?

A. Well, they were the low bidders.

Q. And was there any particular things you remember about their being the low bidders?

A. Well, we had quite a few jobs which involved acoustic ceilings to be awarded approximately the same time, and we found that it was advantageous to award them as a group and take advantage of a discount in price because of our grouping them together and letting them to one contractor.

Q. What do you refer to when you say a discount in price?

A. Downer Company offered a 5 per cent discount from their quoted price if they were awarded two or more of the jobs at that particular time. [1207]

Q. And that was August, '51?

A. Yes, sir.

Q. When did the installation actually take place, if you know?

A. Well, subsequent thereto, a matter of a few months subsequent thereto. I don't have the exact dates.

Q. Did you know Mr. Lysfjord at that time, Mr. Cannon?

A. I knew him as a representative of R. W. Downer Company, yes.

(Testimony of Roger W. Cannon.)

Q. Did you have any close contact or personal relation or business relation with Mr. Lysfjord?

A. Only in respect as he represented Downer Company.

Q. Was that the first series of contracts the Downer Company had ever had from your organization?

A. The Downer Company had done work for us prior to that time.

Q. Over how long a period, if you know?

A. Well, I don't have any accurate information on that; I have personal recollection of doing business with Downer prior to my being with Jackson Brothers, and I think we also did business with Downer Company back in the 1940s. I don't have exact information as to that.

Q. That is the Jackson Bros. Company, to the best of your recollection? A. Yes, sir. [1208]

Q. What factors do you consider in awarding contracts for acoustical tile as a matter of your general business practice?

A. It is our policy to let our contracts to the lowest responsible bidder who can comply with the plans and specifications on which we are working. [1209]

Q. Does your company, as a matter of policy, give any preferential consideration to any particular contractor?

A. Not unless there is a particular reason for it.

Q. Did you have any particular reason for giving preferential treatment to Mr. Elmer Lysfjord?

(Testimony of Roger W. Cannon.)

A. Personally, no.

Mr. Black: That is all. You may cross-examine.

The Court: Before the cross-examination, Mr. Ackerson, we will take up briefly the Brown case, United States v. Richard Brown.

You may sit here or you may step down, Mr. Witness. It will take just a few moments.

(Other court matter.)

Mr. Ackerson: Take the stand again, Mr. Cannon.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Cannon, I didn't get it quite clear when, prior to this August, 1951, dealings that you had with Mr. Lysfjord, the time prior to that that you had done business with the Downer Company. Did I understand you correctly when you said, from your recollection, it was, you thought you recalled, around 1940 Jackson Brothers had done business with the Downer Company?

A. Not in 1940. But in the late 1940's, to the best of my recollection; I am sure that during that time, at least [1210] they figured with us and quoted us on work.

Q. Yes.

A. Within their special line of activity.

Q. You have no distinct recollection, I take it, of any particular job being awarded to the Downer

(Testimony of Roger W. Cannon.)

Company for a number of years prior to this '51 date?

A. I do know that in 1950 they did some work for us. They did one or two or three jobs. I couldn't tell you the extent of them, accurately.

I do recall that they did some work for us in Oxnard, but I don't recall with whom of the Downer Company I dealt at that time.

Q. Yes.

A. I have no record as to who I dealt with with the Downer Company.

Q. I understand. I gather that your own associations, as well as Jackson Brothers, with Lysfjord were satisfactory, were they not?

A. I had very few dealings with him, other than the initial negotiations of our agreements.

Q. Yes. Do you know whether or not either of the Jackson Brothers had dealings with him along about that time, too? I mean dealt with him directly on occasions?

A. I wouldn't know that, unless it were just incidental to the completion of the work they had under contract with us. [1211]

Q. Well, you felt that as far as your dealings with Mr. Lysfjord went that he was an acceptable, presentable representative of Downer Company, a person you would do business with?

A. Yes, sir.

Q. And that he was qualified to discuss and bid these jobs?

A. I do not know what authority he had in making prices.

(Testimony of Roger W. Cannon.)

Q. No, but you found that the prices he submitted and the way he dealt with you was an acceptable way? A. Yes, sir.

Q. And a qualified way? A. Yes, sir.

Mr. Ackerson: That is all. Thank you.

Mr. Black: Thank you, Mr. Cannon.

The Court: May this witness be excused?

Mr. Ackerson: Yes.

The Court: He is excused from further attendance.

(Witness excused.)

Mr. Black: Mr. Krause, will you resume the stand for cross-examination? [1212]

GUSTAV KRAUSE

having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: You have already been sworn.

Mr. Ackerson: You were through with direct, I believe, Mr. Black?

Mr. Black: Yes, I was through with direct.

Cross-Examination

By Mr. Ackerson:

Q. While I think of it, Mr. Krause, when did Mr. Newport leave for Europe?

A. He left July of 1954, I believe.

Q. He has been there a long time, then, I take it?

A. Yes, sir. It is mainly a health reason he went back.

Q. I was just curious. The fact that he has been gone has been raised two or three times during the

(Testimony of Gustav Krause.)

trial, and I wanted to know when he went.

As I recall it, you said the first time you ever heard of the aabeta company was when a salesman of yours came in and notified you that they were bidding on a job with Contracting Engineers, is that correct?

A. I believe it was Contracting Engineers.

Q. And did you also state that Coast, your company, had done a lot of work on the specifications, and so forth, [1213] on that same job?

A. I didn't say that Coast had, but I stated that I felt that our people had worked on that job because it was a Flintkote specification.

Q. Did you feel that Coast should have gotten the job? A. Not necessarily.

Q. Now, as I recall your testimony, you stated that in your talks with Sidney Lewis and Baymiller and Heller that you expressed the idea that it was your understanding that Flintkote had agreed that there would only be three contractors in Southern California in the Flintkote line. Was that your understanding? A. That is correct, sir.

Q. And that didn't have reference to any particular area in Southern California, it was just the fact that you understood there would only be three contractors down here?

A. That is correct.

Q. And you made no specific objection as to San Bernardino or Los Angeles, it was a general objection that they put in a new contractor, was that right? A. That is correct, sir.

(Testimony of Gustav Krause.)

Q. Now, Mr. Krause, it is not clear in my mind whether you stated that Baymiller and Heller came to see you first or whether you saw them after you saw Ragland. Which was it, do you recall? [1214]

A. The record of the times, going back to 1950 or '51, is a difficult thing, remember, but I do know I saw both Mr. Baymiller and Mr. Heller at one time and I saw Mr. Ragland.

Q. At another time?

A. At another time. [1215]

Q. Well, it isn't important. Your first contact, I believe, was with Mr. Sidney Lewis?

A. That is correct.

Q. You stated, also, that Baymiller and Ragland came unannounced out to the Coast Company and found you and Mr. Newport there. Is that right?

A. That is correct, sir. I do recall that, because if they had been announced I would have made it a special point to be there.

When I walked back, here I saw the two of them talking with Mr. Newport. It was news to me.

Q. Do you think if they had called for an appointment Mr. Newport would have had you there?

A. I am positive of that.

Mr. Black: What was the answer, Mr. Krause?

The Witness: I am positive of that.

Q. (By Mr. Ackerson): You pointed to an illustrative story concerning your objections. I believe you said, by way of illustration, that if you had spent a number of years building up a Ford agency

(Testimony of Gustav Krause.)

and then they let another agency across the street, why, you would be mad.

But isn't it a better parallel, Mr. Krause, that if you had a Ford agency and started selling Buicks in the same agency, that Ford would get mad, wouldn't they?

A. Well, if you want to put it that way, Mr. Ackerson. [1216]

Q. Isn't that practically what you were doing, you were selling Simpson, a competitive tile, in the same house with Flintkote tile? That was the case at that time?

A. At that time, Mr. Ackerson, and for the record of the Court I think there should be a definite reason for that—it should be brought out.

The Simpson acoustical tile line at that time was not a complete line. At that time we needed Flintkote tile to fill out our line and make it a complete line.

Q. But they did have duplicating basic board, 12x12 ½-inch and 12x12 ¾-inch, the basic items they duplicated, didn't they?

A. That is correct.

Q. Did Flintkote have a complete line at that time?

A. No, sir, they did not. And another reason, we had strike situations going on at that time where two lines were absolutely necessary.

Q. Well, you have continued to maintain the two lines, haven't you?

A. With the permission of both manufacturers.

(Testimony of Gustav Krause.)

Q. Yes. And by agreement with both manufacturers? A. Correct, sir.

Q. Now, you stated that when Baymiller and Heller came in to see you two people, that is, you and Mr. Newport, they were very incensed. How did they express this anger? [1217]

A. Well, Mr. Baymiller is quite a bombastic individual. He was incensed over the fact acoustical contractors or customers of The Flintkote Company should tell The Flintkote Company how to run their business.

Q. Well, in a way that is what you were doing, wasn't it? A. Well, we were——

Q. You were telling them to cut off a supplier and you objected to their installing a supplier?

A. It wasn't so much we were telling them to cut off a supplier. It was the fact they had opened a new supplier without advising any of us in our firm.

Q. That was past. Your present objection was that the supplier was there, you stated, so you did make that objection, didn't you?

A. It was too late. We didn't tell them to cut off a supplier. We realized that they had opened up——

Q. When you called Mr. Sidney Lewis, didn't you tell him you wanted something done about it right now?

A. We didn't tell him we wanted something done about it right now. We just wanted to know why, what their new policy was.

(Testimony of Gustav Krause.)

Q. If Mr. Sidney Lewis testified you were very emphatic and you wanted some steps taken right now, immediately if not sooner, would you say he was wrong? [1218] A. I couldn't say.

Q. It is hard to remember. You were mad at the time, any way, weren't you?

A. Yes, I was angry.

Q. Now, just what, if you can remember, what was the substance of Mr. Baymiller's expression of anger at the time he came in there and you questioned his, or objected to Flintkote establishing this new customer? What did he say?

A. Well, as I recall, he stated that they felt they needed another distributor in the San Bernardino-Orange County area to call on the malt shops, which was a cold turkey type of acoustical selling.

He stated that we weren't covering that area. All we were doing in that area was bidding. [1219]

Q. And that these clients had agreed to cover it?

A. That they had agreed to cover the area.

Q. What did you say?

A. That particular area.

Q. What did you say to him?

A. We had to admit that we were——

Q. Not covering it?

A. ——not covering the area.

Q. Did you tell them that you would cover it in the future?

A. I don't recall what we said as to what we

(Testimony of Gustav Krause.)

would or what we would not do, but we definitely stated we would make a further effort to cover the area.

Q. And how long did this conference last, Mr. Krause, with Mr. Baymiller and Heller?

A. I don't recall.

Q. Half an hour, maybe an hour?

A. Possibly.

Q. And it was on a pretty heated tone throughout, wasn't it?

A. Well, not on my part so much because I had realized that the act was done and there was nothing we could do about it.

Q. But they did do something about it later, didn't they? You are aware they did terminate these clients at a [1220] later date?

A. I was aware of it, yes.

Q. How long after or before, whichever it was, how much time intervened between your meeting with Baymiller and Heller and your meeting with Ragland, a week or two, a few days or what?

A. I don't recall.

Q. It was right about the same period?

A. It was right about the same time.

Q. Now did Ragland come out and see you and Mr. Newport or just you?

A. Well, he came out to see me.

Q. Mr. Newport wasn't there at that time?

A. Well, Mr. Newport spent only a portion of his time with the company.

Q. At that time?

(Testimony of Gustav Krause.)

A. He was a very sick man. He was suffering from something.

Q. You were more or less the active head of the organization at that time, weren't you?

A. In a sense, yes.

Q. I mean management sense, as far as the production end.

A. As far as the production end, not the financial end of the company. [1221]

Q. Yes, I am talking only of management. I don't mean to imply that you owned a half of it or that you owned any of it.

A. That is correct.

Q. Did Mr. Baymiller and Mr. Heller tell you they were going to do anything when they left that day? A. No, sir.

Q. Let's get to the Ragland meeting with you. When he came out to the Coast Company to see you, either a few days before or a few days afterwards, what did Mr. Ragland have to say? Let's take yours first. What did you tell Ragland? Much the same thing as you told Baymiller?

A. Well, with Ragland and myself it was more of a personal thing. We were paratroopers together, and I said, "Bob, it has always been our understanding that there would only be three acoustical tile contractors appointed by the Flintkote Company as far as the Southern California area is concerned, why did you have to go ahead and appoint another one?" I said, "The least you could have done if you had decided to do it is to have told us

(Testimony of Gustav Krause.)

ahead of time that that was going to be the Flintkote policy."

Q. What did Bob say?

A. It was along that basis.

Q. And Bob just said they promised to cover Riverside for us too and that was our reason? [1222]

A. He said that he really had nothing to do with it, that it was a decision of Mr. Harkins' as to whether or not there would be another acoustical contractor.

Q. Did you tell Bob, that is, Mr. Ragland, that you would see what you could do about covering that Riverside-San Bernardino area in the future?

A. Well, we might have but I don't recall that particular conversation, Mr. Ackerson.

Q. Do you recall in any conversation with the Flintkote people, either Lewis, Harkins, Ragland, Baymiller, Heller, Thompson, any of them, of promising to give Flintkote a better break, that is, buy more Flintkote tile in the future? A. No, sir.

The Court: Before we have another question, Mr. Ackerson, Judge Hall has just come in to see me on what he said is an emergency, so we will have to stand in recess for a few minutes.

(Short recess.) [1223]

Q. (By Mr. Ackerson): At the time you met Mr. Baymiller and Mr. Heller at your offices, Mr. Krause, you were aware, were you not, they were going to see Mr. Howard and Mr. Hoppe, too,

(Testimony of Gustav Krause.)

weren't you? A. No, sir.

Q. Weren't you aware of that?

A. No, sir.

Q. You didn't know they left your office and went over to see those two? A. No, sir.

Q. Didn't you a little later on call Mr. Waldron's home concerning this matter of aabeta's doing business? Didn't you discuss your contacts with Flintkote with Mr. Waldron a little later, Mr. Krause, over the phone?

A. I don't recall.

Q. Let me see if I can refresh your recollection. After aabeta co. was cut off—if we can use that term—didn't you make a couple of attempts to get in touch with Mr. Waldron at his home? I mean over the telephone at his home, and talked with Mrs. Waldron once or twice? A. I don't——

Q. I don't mean talked with her. She told you he wasn't there and you called a couple of times before you got him, do you recall that? [1224]

A. The only contacts I recall having with Mr. Waldron were when he came to our office on one or two occasions, and when he did come to my office just recently, six months ago.

Q. I mean just shortly after these conferences you had with Flintkote, isn't it a fact you did get Mr. Waldron on the phone at his home and tell him you were sorry you had to do this to him, or something to that effect, that you didn't want him to—you didn't want him to dislike you personally for something you had to do in a business way?

(Testimony of Gustav Krause.)

A. I don't recall talking to Mr. Waldron. If I said that I must have had holes in my head, because I certainly wouldn't have said that.

Q. You did feel bad about what had happened to an old friend?

A. I don't know whether he was an old friend or not. He was a friend.

Q. You say you don't recall calling him on the phone? A. No, sir, I don't recall it.

Q. You just don't recall it?

A. I don't recall it.

Q. You say you don't recall calling him on the phone calls to the home before you finally got him? You don't——

A. There are so many things that happened during that period that it is difficult to remember, let me say that to you, Mr. Ackerson. It could be possible, but I am sure I didn't.

Mr. Ackerson: That is all, Mr. Krause.

(Witness excused.) [1225]

Mr. Black: I will call Mr. Howard.

RICHARD E. HOWARD

recalled as a witness by and on behalf of the defendant, having been previously duly sworn, resumed the stand and testified as follows:

The Clerk: Did we swear you once before?

The Witness: Yes.

Direct Examination

By Mr. Black:

Q. What is your occupation, Mr. Howard?

A. Acoustical contractor.

Q. With what company are you?

A. R. E. Howard Company.

Q. How long have you been in that connection?

A. Since 1943.

Q. Continuously? A. Yes.

Q. Are you the proprietor of that company?

A. Not solely, no.

Q. What position do you occupy with relation to it? A. Vice president.

Q. And were you its vice president in the summer of '51 and the spring of '52?

A. No, I was secretary-treasurer.

Q. What was the first occasion that you had any [1226] knowledge or information with respect to the operations of the aabeta company in the acoustical tile field?

A. I can't recall whether I was told that by one of the salesmen, our own salesman that heard someone else tell them, or whether I was told by the

(Testimony of Richard E. Howard.)

Flintkote people themselves or who. It is just very vague.

Q. Did you make any inquiry of the Flintkote people yourself with respect to aabeta company's operations? A. Yes.

Q. When did you do that if you can place the time approximately?

A. Shortly after I heard that they were operating in the Los Angeles area.

Q. Whom did you call in the Flintkote Company? A. I believe Mr. Baymiller.

Q. And would you relate that conversation as best you can, the substance of it?

A. Well, I called to inquire if they were operating in this area and just to relate that the understanding was that I had that they were supposed to have operated in the San Bernardino and Riverside area.

Q. Who said that?

A. I don't know. You mean where did I get the understanding?

Q. Yes. [1227]

A. That was several months prior or, I would say, even a year prior to this time. That was just an understanding that there were to be three contractors in this area handling the Pioneer-Flintkote line.

Q. I think you misunderstood me. You said something about this conversation and the plaintiffs being restricted to the San Bernardino-Riverside area. Who said that?

(Testimony of Richard E. Howard.)

A. Some of the Pioneer-Flintkote people, either Mr. Heller or Mr. Baymiller.

Q. You don't recall whether that was said on the telephone call?

A. Oh, no. I had heard prior to finding out that they were operating the Los Angeles area that they were operating up in the San Bernardino area.

Q. Did you have any further contacts about that time with the Flintkote representatives?

A. You mean after my hearing of them operating in the Los Angeles area?

Q. After you first talked to Mr. Baymiller as you have described.

A. Yes. I met Mr. Baymiller and Mr. Heller in Sound Control's office with Mr. Hoppe.

Q. How did you happen to be in Mr. Hoppe's office?

A. That I don't remember, whether I was asked to be there or whether I just happened by. [1228]

Q. What was said on that occasion by you, Mr. Hoppe, Mr. Baymiller and Mr. Heller, if you remember?

A. Very little, so far as I am concerned. I had very little to say. I was more or less listening to what the other people were saying.

Q. What do you recall as to what the other people said?

A. That the question—it was mostly a question, were they supposed to operate in this area or were they supposed to stay up in San Bernardino and Riverside Counties.

(Testimony of Richard E. Howard.)

Q. What specifically that you now recall did Mr. Baymiller or Mr. Heller say?

A. Neither one of them would say a great deal, because they said at that time they couldn't make any decisions. They would have to go through their office, someone that could make a decision, and find out if anything was going to be done about it.

They, too, were under the impression they weren't supposed to operate in this area, or in the Los Angeles area.

Q. Did you attend any general meeting of the acoustical tile contractors handling Flintkote products about this time, with reference to the aabeta co.? A. Nothing.

Q. Did you ever hear of any such meeting?

A. No.

Q. Did you on that occasion or any other occasion tell [1229] any other Flintkote representatives that you would cut off your business with them if they didn't terminate the plaintiffs?

A. No, sir.

Q. Did you ever hear of any of the other Flintkote tile contractors making a similar statement?

A. No, I didn't.

Q. Were you or your company engaged at that time or immediately prior to or around that time in any plan for allocating bids on public jobs?

A. No.

Q. Or for fixing prices in that connection?

A. No, sir.

Q. Did you ever tell any of the Flintkote rep-

(Testimony of Richard E. Howard.)

resentatives that such a plan had been or was in operation? A. No, sir.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Howard, prior to this conversation with Baymiller, the first one, was that the first time you contacted Flintkote with respect to aabeta's being in business?

A. Yes; over the telephone I had called Mr. Baymiller or Mr. Heller; I can't recall which one, but I believe it was Baymiller. [1230]

Q. Didn't you also go down to the Flintkote offices?

A. I have never been in their offices.

Q. For that purpose.

Mr. Black: Would you repeat the answer, please?

(The answer was read.)

Q. (By Mr. Ackerson): You have never been in Ragland's, Baymiller's, Thompson's office——

A. I have never been in the Pioneer-Flintkote office.

Q. So it was by telephone? A. Yes.

Q. You talked with Baymiller, you say?

A. I believe.

Q. What did you tell him?

A. I didn't tell him. I asked him—or I told him that I heard—I will put it that way. I heard the

(Testimony of Richard E. Howard.)

aabeta co. was operating in Los Angeles and asked him if that was the policy. That I had understood they were to operate in the other area, Riverside and San Bernardino.

Q. Well now, I don't have it straight in my mind, Mr. Howard, where you got the idea originally they were to operate in San Bernardino.

Obviously, it was before you called Baymiller. Where did you get that idea?

A. I don't recall. It was an understanding that I had gotten through someone in the Pioneer-Flintkote Company, whom I don't remember; at that time it wasn't that important. [1231]

Q. You just have no recollection on that aside from the fact that you did have an understanding to that effect?

A. That is right. We weren't working in the area and I wasn't concerned with it.

Q. Well, you are not restricted to any territory, are you? A. No.

Q. You could work anywhere?

A. Anywhere. But we just weren't working the area.

Q. And I think you know that that is true, or that that was true at that time, with both Sound Control and Coast?

A. No, I didn't have much—well, I didn't know where they were working or where they weren't.

Q. No, but that they had the right to work anywhere? A. Yes, as far as I know.

(Testimony of Richard E. Howard.)

Q. Now are you sure that someone from Coast, Sound Control, Downer or someone like that, didn't call you up about these people being in business? Could that have been where you got your information? A. It may have been.

Q. It could have been?

A. It could have been.

Q. It could have been Mr. Arnett down at Downer's who was the former—— [1232]

A. No, not likely.

Q. But it could have been?

A. Oh, it may or could have been, yes.

Q. It could have been any acoustical tile contractor? A. That is right.

Q. Now where did you get your understanding that there was an agreement or an understanding that Flintkote would only have three acoustical tile outlets in this area? Who gave you that understanding? A. I believe Mr. Baymiller.

Q. When was that? When did he tell you that?

A. Shortly after we took the line, and I believe that was in either '49 or '50. At the time that we took on the Pioneer-Flintkote line there was only one other contractor at that time handling it.

Q. Who was that, Coast?

A. Degan & Brody.

Q. They are no longer in business?

A. No.

Q. Did Mr. Baymiller come to you to get you to take on the line or did you go to him to request it?

A. No, he came to us.

(Testimony of Richard E. Howard.)

Q. And you think that is where you got your understanding about limiting the contracts in Southern California to three? [1233]

A. Yes. It was discussed this way because they wanted to put the line out to three different contractors, those who already had another manufacturer's line, that would complete their acoustical line because they were limited just having started in manufacturing.

We had U. S. Gypsum Company which in itself wasn't a complete line, but the two companies rounded it out very well.

Q. Well, at that time U. S. Gypsum manufactured 12 x 12 one-half inch tile, didn't they?

A. That is right.

Q. And 12 x 12 three-quarter inch tile?

A. That is right, but not perforated.

Q. U. S. Gypsum's wasn't perforated at the time? A. No.

Q. Well, Flintkote sold the same sizes, did they not?

A. They sold other sizes as well, 24 x 24.

Q. So that you did have two overlapping lines, though? A. No.

Q. Insofar as those sizes went?

A. No. Sizes wouldn't meet the specification. It had to be perforated and had to be a certain type.

Q. When did U. S. Gypsum start perforating, the following year?

A. No, I think about three years ago '52. I am not [1234] to sure. I don't remember.

(Testimony of Richard E. Howard.)

Q. Did they sell perforated tile in '51 and the first part of '52?

A. It could be. I don't remember. Still they don't have the types that Pioneer-Flintkote makes.

Q. You have, I take it, on occasion sold acoustical jobs outside of this immediate Los Angeles area, haven't you, Mr. Howard?

A. Oh, yes.

Q. And in 1951 and '52 I believe you said you were secretary of the Howard Company. You were also the active manager of the company, weren't you? A. That is right.

Q. You were the working manager—well, active is good enough. A. All right.

Q. That was your principal duty, and you did head that department up of the company, didn't you? A. That is right.

Q. Now how long did this meeting with Mr. Heller and Mr. Baymiller last over at Mr. Hoppe's office?

A. I don't believe it was more than a half an hour.

Q. You have heard this testimony about Mr. Baymiller being rather incensed at the Coast office. Was he incensed when he came over to your office? [1235]

A. No, very quiet and calm. There was no excitement at all.

Q. And he didn't commit himself on whether they should be in San Bernardino or whether Flint-

(Testimony of Richard E. Howard.)

kote would restrict them there or what Flintkote would do, did he?

A. That is right. As I recall, he said he didn't know much about it, couldn't make any decisions.

Q. Though he expressed that he didn't know where they were to be or what they would do about it? A. That is right.

Q. Now did you also see Mr. Ragland on this same subject matter? A. No.

Q. Did he call you on the phone about it?

A. No, I don't believe I met Mr. Ragland until after that time.

Q. So you have no recollection——

A. None at all.

Q. ——of him getting in touch with you about the aabeta business at all? A. None.

Q. And if Mr. Ragland testified that way you would say he was wrong?

A. Will you repeat that again?

Q. If Mr. Ragland said he did contact you in connection [1236] with this aabeta company matter, then you would say that his testimony was in error, wouldn't you?

A. I would say if he did discuss it with me that I couldn't remember it.

Q. Did you have any contacts with Mr. Thompson in this connection? A. No.

Q. Did you have any contacts with Mr. Harkins in this connection? A. No.

Q. Do you know Mr. Harkins?

A. I met him here Thursday or Friday.

(Testimony of Richard E. Howard.)

Q. Did you know Thompson?

A. I met him also for the first time here.

Q. You had known Baymiller prior to this meeting? A. Oh, yes.

Q. And you had known Ragland prior to this meeting? A. Yes.

Q. Are they the two you usually dealt with in connection with the Flintkote tile?

A. No, Mr. Baymiller and Mr. Heller.

Q. And Mr. Heller? A. Yes.

Q. Did Mr. Heller have anything to say at all at this meeting? [1237]

A. I don't recall him saying anything. Mr. Baymiller has always been over him in authority and I think he left it more or less up to him.

Q. Seemed to always let him do the talking?

A. Yes.

Mr. Ackerson: That is all.

(Witness excused.) [1238]

Mr. Black: Again I am in the position of having arranged for a witness the first thing this afternoon, your Honor. I assumed that this would go somewhat longer than it did. It is my last witness and it will be very brief.

The Court: We are trying to get through this case. Ordinarily courts don't try jury cases on Monday, because we have so many short cause matters.

Isn't there something you can offer? I had

planned to sit until 12:30 and then recess this case until tomorrw afternoon.

Mr. Black: Oh. I just have this accounting data. Maybe we can introduce it by stipulation.

Mr. Ackerson: I haven't seen it. I haven't any idea what it is.

Mr. Black: I think we need his testimony. I will be glad to go over this material with you. We will see if we can get hold of Mr. Bradley. There is just this one witness we have remaining. I had assumed —I am sorry——

The Court: When we have to devote only a part of a day to a case, I like to at least use that part of the day for the case.

Mr. Ackerson: Your Honor's plan was to go to 12:30 and adjourn until tomorrow?

The Court: Yes.

Mr. Black: We will see if we can get the witness right [1239] away.

If the court please, I am sorry, I just misunderstood the schedule. I assumed we would go on in the afternoon session today.

The Court: Well, the court stated early in the trial cases of this nature are, with all respect to them, so dull that it is difficult to keep, or, for a jury to keep alert attention on them if we run more than half a day at a time.

Mr. Black: We could do this, if Mr. Ackerson will consent to it: We will rest subject to this one witness, strictly relating to the books and records of aabeta co., and you could proceed if you have any rebuttal.

Mr. Ackerson: I have about a half hour or hour's rebuttal. I am perfectly happy to do that.

Mr. Black: Let's do that. That will solve our problem.

Mr. Ackerson: Will you take the stand, Mr. Lysfjord?

ELMER LYSFJORD

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, I don't believe you have been here part of every session, so there are a few questions I want to ask you. [1240]

Do you recall the contracts that you brought to that second meeting at the Manhattan Club?

Do you have them generally in mind, as to what they were and what they consisted of?

A. Yes.

Q. Mr. Baymiller testified that he glanced over them and about 50 per cent of them were decorative tile. What do you have to say about that?

A. I would say there wasn't even one that was decorative tile.

Q. What sort of jobs were they, Mr. Lysfjord?

A. They were market buildings and I recall the names of a good many of them.

Q. What were they?

A. Von's Markets, two or three of those. A

(Testimony of Elmer Lysfjord.)

Ralphs' Market. A gas company in Inglewood. All of these use an acoustical tile; they do not use decorative tile.

Q. So it is your statement there was little, if any, decorative tile in any of those contracts?

A. I would say there was none at all.

Q. Now, did you ever have a conversation with Mr. Ragland concerning Phoenix operation acoustical tile?

A. Not definitely that one particular area. At our first contacts he mentioned quite a few places that he knew for sure that we could get a line, and I told him at that time [1241] I wasn't interested in working anywhere except the Los Angeles area.

Q. Was that before Mr.—those early conversations—by that do you mean before Mr. Ragland became promotional manager of acoustical tile?

A. Oh, no, no, no.

Mr. Black: Just a monent. That isn't quite correct. I don't think there is any testimony that he was manager.

Mr. Ackerson: I am using the term loosely, let's let the record show. Promotional man, sales promotion man.

Q. (By Mr. Ackerson): Are those early conversations you are referring to concerning Phoenix and many other localities before or after that June date when he took on that job?

A. That would be rather difficult for me to say, as to if it were before or after he had a change in

(Testimony of Elmer Lysfjord.)

his position in the company, because I wasn't aware of the fact there was a change.

Q. You thought he had the same job all the time?

A. So far as I was concerned, he did.

Q. As nearly as you can tell us, just what was it he said and what was your reply with respect to these other areas?

A. Well, as I said, he mentioned several areas that were quite remote from this area and said they had no representation there and it would be a very easy matter for us to [1242] become distributors in these areas.

And I replied that I was not interested whatsoever in going in any other area than Los Angeles, because I had spent a considerable part of my life here making contacts and friends, and 90 per cent of the sales business is in contact.

Q. Did you ever promise Mr. Ragland that you would go down to Phoenix and look the place over?

A. I had no idea of going to Phoenix.

The Court: The question is, did you ever promise Mr. Ragland you would go?

The Witness: No, sir, I never did promise him.

Q. (By Mr. Ackerson): Did you ever go to Phoenix for that purpose?

A. I have never been in Phoenix.

Q. Did you ever tell Mr. Ragland that you had been to Phoenix but you were there on a Sunday and you couldn't find out much about the acoustical tile business on a Sunday?

A. No, sir, I never did. Besides, it would be

(Testimony of Elmer Lysfjord.)

rather difficut to get to Phoenix and back on a week end, wouldn't it?

Q. Did you ever make a statement at either of these Manhattan Club meetings or elsewhere to Baymiller, Ragland or Thompson, that you had certain closed jobs or closed contracts that nobody else could sell, and I think they said you mentioned Contracting Engineers as one, and one or two others? [1243]

A. In the contracting, subcontracting business there is no such thing as a closed contract. There are friends, acquaintances, the ability to be able to talk to these people on jobs prior to their letting of these jobs.

As far as you mentioned, the Contracting Engineers, I don't think you could have picked one contractor in the whole city that would be less inclined to be known as a closed contractor. They take the very lowest bids of all.

Incidentally, I have never ever done a job for the Contracting Engineers as the aabeta co.

Q. Did you make any statement to the effect that Jackson Brothers would only buy from you?

A. No, sir, I never told them they would buy from us only or from me. It was I had the ability to talk with these people, primarily Mr. Cannon, who was here before, and discussed and arranged for a group of jobs to be sold at one time.

Q. And you showed him such jobs, did you, or called their attention to this fact?

(Testimony of Elmer Lysfjord.)

A. Yes, sir, I showed them contracts for those jobs.

Q. Do you know whether or not, while you were with the Downer Company, anyone else representing the Downer Company sold Jackson Brothers, obtained jobs from Jackson Brothers for that company?

A. On the contrary, the salesmanger at the time of my first contract was very elated with the fact we were able [1244] to get a job from Jackson Brothers, because in the past, with the exception of many years previous to my coming there, they had never been able to get any work from the Jackson Brothers. [1245]

Q. Who was it, Arnett? A. Arnet.

Q. Mr. Lysfjord, tell the court and jury what, if anything, you had to do with this Owens Roofing job that you have heard testified about here.

A. Frankly I had practically nothing at all to do with it except for the fact that I was aware that they did it.

Q. Did you learn about that job by having happened to be in the Flintkote offices? Do you remember that?

A. No, sir. I was told by Mr. Waldron that he had been down talking with the Owens Roof people and that he had acquired the job. At no time have I ever been to the Owens Roofing Company. Frankly, I don't even know where it is, except that it is in Los Angeles.

Q. You never met either of the McClains, the

(Testimony of Elmer Lysfjord.)

father or son? A. No, sir.

Q. Did you ever have any conversation with Ragland about the Owens Roofing Company job?

A. No, sir.

Q. Were you down to the Flintkote Company at any time that Anderson, their roofing salesman, came in and is alleged to have told Ragland about the job?

A. No, sir. The only times that I have ever been to [1246] the Flintkote Company's offices has been related at this court hearing.

Q. Did you ever—this may sound like a silly question, but I nevertheless want to ask it—did you ever accompany Ragland and/or Anderson over to the Owens Roofing Company offices?

A. No, sir.

Q. Did you have anything to do with performing the job, installing the tile?

A. Nothing whatsoever.

Mr. Ackerson: You may cross-examine, Mr. Black.

Cross-Examination

By Mr. Black:

Q. Now in connection with the mention, Mr. Lysfjord, of these various distant points, Phoenix, Albuquerque, Denver, and so forth, that you state Mr. Ragland brought up, wasn't the reason he brought it up because he told you that the Los Angeles area was not open but that these territories were? A. No, sir.

(Testimony of Elmer Lysfjord.)

Q. What was the occasion of his mentioning these distant points, if you know?

A. Well, he said that he was sure that without any trouble whatsoever that he could get me a distributorship in these several areas that have been mentioned, and that was [1247] at the outset of the conversation, and I told him that I was absolutely not interested whatsoever in going anywhere but in Los Angels area, that I have chosen this place to be where I am going to live, and I have no intentions of going anywhere else.

Q. And you are prepared to state positively, Mr. Lysfjord that Mr. Ragland did not tell you that Los Angeles was not open but that these distant places were? A. Yes, sir.

Q. Now in connection with the matter of this Owens Roofing job, do you know whether Mr. Waldron did any of the installation work himself on that job?

A. I am quite sure that he told me he did.

Q. That he did? A. That he did.

Q. But you didn't help him on it?

A. No, sir.

Q. Do you know who did assist him, if anybody?

A. I believe it was Mr. Yoemans. However, I can't say positively.

Q. Well, Mr. Yoemans was not an ordinary crew man, was he? Did he normally do that work for you?

A. He is the first man that we ever had working

(Testimony of Elmer Lysfjord.)

for us. I am speaking now as the aabeta company, I owning it.

Q. Did he do the installing work or did you have a [1248] regular labor crew that did it?

A. What time are you referring to?

Q. When you first started.

A. At the time that I joined the company?

Q. Yes.

A. Yes, sir, he did the installation and also the truck driving.

Q. And did you and Mr. Waldron occasionally do installing work yourself? A. Occasionally.

Q. But it was Mr. Waldron rather than yourself that did it on the Owens Roof job?

A. That is true.

Q. Do you know a Mr. Scharf in the Contracting Engineers?

A. I am acquainted with him.

Q. Didn't you tell Mr. Ragland at the aabeta company office when he came down to find out—no, I don't believe. You deny that such a meeting existed, don't you? A. What meeting?

Q. You deny that there was a meeting at which Mr. Ragland came down to the Atlantic Boulevard address to tell you that you weren't supposed to be operating in that area?

A. I never said that ever.

Q. That is what I say, you deny that there was such [1249] a meeting?

A. I never denied that he ever came down and talked to me.

(Testimony of Elmer Lysfjord.)

Q. I mean for the purpose of telling you that you weren't supposed to be in the Los Angeles area.

Mr. Ackerson: Will you ask him the direct question?

Q. (By Mr. Black): I will put it this way: Do you recall a meeting at which Mr. Ragland came down to the Bell office and announced that you weren't supposed to be in the Los Angeles area?

A. Yes, sir, I deny that very vehemently.

Q. You deny that such a meeting took place?

A. Right.

Q. Do you remember discussing Mr. Scharf or the Wagner Brothers Construction Company jobs with Mr. Ragland?

A. There was some conversation to the effect that, were we bidding in the Los Angeles area, and I replied very readily we were, as I saw no reason why we shouldn't be.

Q. Was that before the termination meeting?

A. That was before the termination meeting.

Q. When did that happen, Mr. Lysfjord?

A. Oh, a matter of weeks, perhaps a month before we were terminated.

Q. And Mr. Ragland then did come down to find out [1250] whether you were bidding in the Los Angeles area apparently, did he?

A. Well, he came down to the office. What his purpose was I don't know.

Q. That was the subject of what he had to say, wasn't it?

(Testimony of Elmer Lysfjord.)

A. Well, he asked if we were bidding on certain jobs, and I answered yes.

Q. And those certain jobs were the Wagner Construction Company job, were they?

A. Possibly.

Q. Did he also mention the job for Contracting Engineers, or did you?

A. It is very difficult for me to remember individual jobs.

Q. You were in fact bidding on a job at that time for Contracting Engineers, weren't you?

A. We bid many jobs with Contracting Engineers.

Q. Well, now, what again do you recall that Mr. Ragland said on that occasion with respect to whether you were bidding jobs in the Los Angeles area or not?

A. He asked the very direct question whether we were bidding on several jobs that he mentioned, and I answered yes, we were.

Q. And what did you say to that? [1251]

A. I just answered it. I said we were.

Q. And what did he say in reply to that?

A. I don't think he mentioned anything at all. He asked a direct question and I answered it.

Q. He didn't say anything at all at that meeting about the fact that you weren't supposed to be in the Los Angeles area?

A. He has never ever made a statement to me of not doing work in the Los Angeles area, with the

(Testimony of Elmer Lysfjord.)

exception of the termination meeting, where he didn't speak at all.

Q. And how long did he stay at that meeting when he asked you about bidding in the Los Angeles area? A. I have no idea.

Q. Who else was present?

A. I don't recall.

Q. Was Mr. Waldron there if you can think back on it? A. Possibly he was.

Q. What did he say, if you remember, on that occasion?

A. I don't even remember if he was there or not.

Q. How long did this meeting last?

A. I have no idea. Quite often we went down to the corner for coffee. It could have been anywhere from half an hour to an hour and a half. He at times previous to that and possibly after that came by quite often for morning coffee with me. [1252]

Q. But you don't recall positively whether Mr. Waldron was or was not there at that meeting?

A. No, sir, I don't recall.

Q. You don't have any particular close relations with the Waggoner Construction Company?

A. No, sir.

Q. Did you tell Mr. Ragland you had?

A. No.

Mr. Black: I think that is all.

Mr. Ackerson: I have a couple of other questions.

(Testimony of Elmer Lysfjord.)

Redirect Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, subsequent to your meeting with Mr. Harkins at the time you were told that you could be a Flintkote dealer, how many times would you say you had seen Ragland at the Bell Avenue address of aabeta co.?

A. Easily a dozen times.

Q. Could it have been more?

A. Possibly; quite possibly.

Q. Have you ever seen him at that plant, that address, subsequent to the termination meeting?

A. Any number of times.

Q. Has he been out there since then?

A. No, sir.

Q. You misunderstood my question. The question was, [1253] has he been out to the plant since the termination meeeting?

A. Since the termination meeting?

Q. Yes.

A. I don't believe I have ever spoken to Mr. Ragland since the termination.

Q. So that all these meetings were prior to the termination meeting? A. Yes, sir.

Mr. Ackerson: That is all.

(Testimony of Elmer Lysfjord.)

Recross-Examination

By Mr. Black:

Q. Just one question. You had nothing to do personally with Mr. Ragland with respect to filling orders, contracts that you had let?

A. I don't understand the question.

Q. The time subsequent to the termination meeting, you bought about a third of a car of tile, I think it was, or maybe a half a car of tile from Flintkote.

A. We bought a carload and——

Q. I say subsequent to the termination meeting. You had purchased the first car prior to that time, had you not? A. Yes, sir.

Q. Subsequent to the termination you bought an additional quantity of tile from Flintkote?

A. Yes. [1254]

Q. Didn't you have any contact with Mr. Ragland in connection with that operation?

A. I saw Mr. Baymiller, in company with Mr. Waldron, at their offices. If Mr. Ragland was present I don't recall it at this time. It is quite possible he was, but there was no conversation between he and I, I remember.

Q. You don't recall any contacts with Mr. Ragland with respect to possible other sources from which you could get tile?

A. No, I—rather, Mr. Baymiller contacted me. Mr. Ragland may have given me a phone call or something like that.

(Testimony of Elmer Lysfjord.)

Q. You don't recall any personal meetings with him? A. No.

Mr. Black: That is all.

(Witness excused.)

Mr. Ackerson: I will call Mr. Waldron.

Your accountant is not here?

Mr. Black: Well, I don't believe—I understood that he was coming this afternoon, but apparently there is no afternoon session, and I don't think we can get him until the noon hour.

Mr. Ackerson: Very well. We will take up part of the time here.

Will you take the stand, please, Mr. [1255] Waldron?

WALTER R. WALDRON

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Ackerson:

Q. Mr. Waldron, did you examine any of the contracts in this portfolio of contracts brought to the second meeting at the Manhattan Club?

A. I believe I did. I believe I checked perhaps quantity against cost, as a normal routine.

Q. Were there any of your own contracts in that portfolio or were they all Lysfjord's?

A. No, I had some separate. I had a couple of

(Testimony of Walter R. Waldron.)

jobs with me. I think one was—I don't remember what they were now; some market jobs, I guess.

Q. Do you recall whether or not those jobs that you now refer to had anything other than acoustical tile in them?

A. I don't believe so; at least, mine didn't.

Q. Did Mr. Ragland individually ever discuss the possibility with you of taking a Phoenix franchise or a Denver franchise, or something like that?

A. I don't believe so, Mr. Ackerson.

Q. Was such a subject brought up by any of these Flintkote people at any of your meetings at the Manhattan [1256] Club or the——

A. About outlying—out-of-state—is that what you are referring to?

Q. Yes. About taking their line some place else, in Denver, Nevada or Phoenix?

A. I think I heard—I don't know if I joined in on general conversation—that they hadn't set up anyone out of state to any degree, and would like to do that in due time, whenever they could find someone.

But I don't remember of it being put to me as a point of—to be considered by myself.

Q. In other words, it was just casual conversation?

A. Yes. I don't believe they had anyone at all in the out-of-state—or, at least, to speak of; the way they talked.

Q. With reference to these out-of-state points, did they have anything to do with the business at

(Testimony of Walter R. Waldron.)

hand of you and Lysfjord getting a line of acoustical tile, or was it just conversation?

Mr. Black: That is objected to as leading.

Mr. Ackerson: Well, I will strike "or was it conversation"——

Q. (By Mr. Ackerson): Did it have anything to do with the business at hand of you getting acoustical tile?

A. No, no. I am not too sure that was brought up at [1257] that meeting. I think it was just general conversation.

It might have been between Elmer and myself, that they needed someone out of state. But I don't —my recollection now is I don't believe it was a point of issue at that meeting.

Q. Did you ever seriously consider getting an acoustical tile line to be applied out of the state or setting up an out-of-state office, rather than Los Angeles? A. No, I didn't.

Q. Did you ever assert any interest to Ragland concerning setting up a business in Phoenix?

A. No.

Q. Did you ever discuss it with him?

A. I don't believe I ever discussed it at all in a serious nature. If I did, it was just conversation of how—where they planned to operate.

I don't remember they had started to explore those areas themselves at that time.

Q. Did you, Mr. Waldron, at any of these meetings at the Manhattan Club or any of the meetings

(Testimony of Walter R. Waldron.)

preceding your introduction to Harkins, ever discuss these closed contracts or closed situations?

A. With Mr. Harkins?

Q. Yes. Or with Baymiller, Ragland or Thompson. Did you ever tell them you had a closed account that nobody could [1258] get to?

A. No, I don't believe so. They may have used the word "acquaintances" or "people you had worked with for a number of years" and felt that was a meaning on our part. But that is impossible to do, because the general contractors, if they allow subcontractors to have the figure they want, I don't believe they would be in business very long.

Q. In your experience you have never had a general contractor that would give a job to you if your bid was high, in preference to someone else with a low bid, have you? A. No, I haven't.

Q. What about this Waggoner Construction Company that has been mentioned here, do you have a special "in" there?

A. I don't know that you would call it a special "in." I have never gotten a job there that was any more money in it than someone else wanted it for. And if my—I have lost jobs there because of that.

Q. Do you own any of that company, are you financially interested in Waggoner Construction Company. A. Oh, no.

Q. In other words, your only contact has been as a salesman of acoustical tile?

A. That is right.

Q. Now, Mr. Waldron, I would like you to recall

(Testimony of Walter R. Waldron.)

as nearly as possible just how, what you know about this Owens [1259] Roofing job, how it come to you, to your attention.

And then just proceed chronologically and tell us what happened. When did you first hear of the Owens Roofing job?

A. As I recall it, Bob told me about it, to go over there because he had mentioned to them that we were in the business and we would be happy to figure the work.

But I don't remember of Bob being there, as he mentioned, that he introduced one of us; he thought it was Elmer. I don't remember him being there in that office.

Q. Do you recall whether Ragland called you on the phone about the job?

A. I believe that was the way it was, because there was no other—unless he stopped by the house, or something of that nature, but I believe he called me on the phone. [1260]

Q. Then what did you do? Did you go see the McClains over there? A. Yes, I did.

Q. Who did you see? Was it the elder McClain or the younger McClain, if you know?

A. I saw the younger McClain. Jim they call him, I think.

Q. And what transpired? What did you say and what did he say and what was the result?

A. Well, I told him that we were the new representatives for the Flintkote people, and Bob asked me to stop by on this job, and he remembered—I

(Testimony of Walter R. Waldron.)

asked him if he know Bob Ragland. He said he did. I don't know how well. But anyway it tied the association together there. And he let me figure it then told me to go ahead and do the job.

Q. Without any bidding at all?

A. Well, I had a bid there. I don't believe he had another bid. I am not sure.

Q. Now did you put that job in yourself, by that I mean did you actually apply the tile?

A. Yes. My superintendent, or our first man with us, who turned into our superintendent, helped me.

Q. That was Mr. Yoemans? A. Yes.

Q. Do you recall when you did that job, you and [1261] Yoemans?

A. I think it was sometime in February or January of '52, but I can't remember the exact date. I think it is here. I believe I saw the old contract the other day but I have forgotten what the date was. It was right along in there.

Q. How long did it take you to put in the job?

A. I believe two days or three days.

Q. Did Mr. Lysfjord have anything to do with the job, I mean any personal contact with the job, to your knowledge?

A. No, he was busy at the time.

Q. He was still with Downer Company then?

A. I believe he was finishing up in clarification of jobs and work procedures or changes on jobs, if they wouldn't be understood by the new salesman, and that was why he was staying over.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Now, if your Honor please, I notice that we have some exhibits marked for identification. I think they have been identified thoroughly. I think it is proper rebuttal to put them in. They relate to Mr. Black's questions of each of these people, and I believe they should be introduced in evidence at this time as rebuttal testimony.

I am talking about the Downer exhibits, the Howard exhibits and those other take-off sheets. I would like to offer them at this time.

Mr. Black: Aren't they already in [1262] evidence?

The Clerk: They are in as 19 through 24, I believe.

(Conference between counsel and the clerk.)

Mr. Ackerson: My notes show that some of them are not in.

The Clerk: No. 30 I don't show in.

Mr. Black: That is the Armstrong file. I don't believe so.

Mr. Ackerson: I think I have sufficient of them in.

Mr. Black: Is No. 32 in?

The Clerk: No, sir, I don't show that.

Mr. Ackerson: What is that?

Mr. Black: That is Coast.

Mr. Ackerson: Is 35 in?

The Clerk: Yes, 33, 34 and 35. 32 is not.

Mr. Ackerson: Well, then, I will offer 32 at this time, Br. Black. I think the rest of them are in.

(Testimony of Walter R. Waldron.)

Mr. Black: Subject to the same formal objection, if the Court please, made to all of this testimony.

The Court: Received in evidence.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 32.)

Mr. Ackerson: Now, your Honor, I am ready for Mr. Black's witness. I don't want to close until I have heard him.

Mr. Black: I may have a spot or two of cross-examination. [1263]

Mr. Ackerson: Yes. Go ahead.

Cross-Examination

By Mr. Black:

Q. How early in the progress of these negotiations, Mr. Waldron, did you begin to have any extended discussions with Mr. Ragland?

A. Well, I think it would be somewhere in the fall of '51. There were several general conversations along those lines with him and Lysfjord prior to the time of my entering into it.

Q. I may be in error in this, but I had the impression that you hadn't made up your mind to go into partnership with Mr. Lysfjord until a fairly late date in this operation. Am I right on that?

A. I think that is correct.

Q. When was it that you finally decided to go into partnership?

A. I don't remember the exact date, but I know

(Testimony of Walter R. Waldron.)

we agreed if we could get a line then we would form a partnership, but I don't know exactly when that was. Did I state that before?

Q. No, I am not trying to contradict you, I am trying to clear up something in my own mind that I am a little uncertain about, just when in the scheme of things that it was [1264] your intention to go into this partnership business.

A. Probably somewhere in the fall or late fall or early winter of November, October or November, somewhere in there maybe.

Q. Are you able to state one way or the other whether it was before or after Mr. Lysfjord had his first meeting with the Flintkote people, which we refer to as the first Manhattan Supper Club meeting?

A. I think it was before that. However, as I remember, his first talking regarding the acoustical line was more or less for himself because he didn't know at the time that I might be interested, and I don't believe we got together on it until sometime in October and November for sure.

Q. You didn't have any really serious discussions then with Mr. Ragland before that date, did you?

A. Before which date?

Q. Before the date that you had pretty much made up your mind at least to take a chance at going into business with Mr. Lysfjord?

A. We discussed the possibility of going into business. However, we didn't want to go into it without being a competitive contractor and we made

(Testimony of Walter R. Waldron.)

comparisons of costs of materials from lumberyards as to what we were doing in the field at that time, and it didn't show a very good picture to start business with. That was early that year sometime. [1265]

Q. Early in '51?

A. Yes. We discussed it for some time.

Q. My question relates to your discussing the matter with Mr. Ragland. Did you start talking to him much before the time you started deciding pretty much definitely to go with Mr. Lysfjord?

A. Our conversations were that if we got a line we would form a company, a partnership, but how early that was I don't know. I think it could have been tentatively in our minds from the beginning.

Q. I am talking about you personally, not either of you, but I mean you personally.

A. Well, I can't fix a date, but I think it was probably September or somewhere in the early fall, as nearly as I can think of it at the moment.

Q. Were you at a meeting at the Bell office when Mr. Ragland asked whether you were bidding on jobs in the Los Angeles area?

A. Well, I don't see how that could have happened—I will answer your question, too, sir.

Q. Don't start speculating with me.

A. I am sorry.

Q. Will you try to answer my question? Do you recall any meeting at the Bell office at which Mr. Ragland specifically asked either your or Mr.

(Testimony of Walter R. Waldron.)

Lysfjord if it was true you were bidding jobs in the Los Angeles area?

A. Not to me. I was there at one of his meetings, too, Mr. Black, when he was telling about Mr. Krause being so angry.

Q. I don't mean—— A. But——

Q. Go ahead.

A. I believe you are thinking that that might be the time. But he was there prior to that on various occasions.

Q. On that or some other occasion, do you recall his [1267] asking about specific jobs, including the Waggoner Construction—what is that company? I can't remember at the moment.

A. Waggoner Construction Company.

Q. Waggoner Construction Company. Do you remember his asking about that?

A. I don't know if he asked about it specifically. I know I had it, and had he I could have showed it to him. He might have asked me, Mr. Black, but I wouldn't know. I wouldn't be able to tie it down, because, as I remember, there was nothing contrary to his being there, to our activities at that time. He came over to tell us about some promotion——

Mr. Black: That is all a conclusion of the witness, if the Court please. I am asking if he remembers a discussion.

I will ask that that part of the answer be stricken, "there is nothing contrary to our intention at the time" or what not.

The Court: Motion granted.

(Testimony of Walter R. Waldron.)

Q. (By Mr. Black): But you do remember there was some discussion between you and Mr. Ragland about the Waggoner job?

A. I don't recall it as being any particular job. I know that was one of the first jobs probably I got a contract on, of a good-sized job. I might have told him about it.

Q. You don't remember discussing that job specifically by name with Mr. Ragland? [1268]

A. I don't know, Mr. Black, I don't recall—I don't think so.

Q. You don't think so? A. No.

Q. You don't think Construction Engineering Company was mentioned?

A. What engineering company, sir?

Q. Construction Engineering Company. Is that the right name?

Mr. Doty: Contracting Engineers Company.

Q. (By Mr. Black): Contracting Engineers. I am having a terrible time getting these names straight.

Do you recall that being discussed, too, that company?

A. I don't know. That might have been at another time, Mr. Black, he was there, when I wasn't present.

Q. Your recollection on that is very indefinite, I take it?

A. Contracting Engineers, yes, because I rarely had been in their office. My acquaintance there was with just one person, Mr. Walter Levine.

(Testimony of Walter R. Waldron.)

Q. But you have had a lot of work or considerable work with the Waggoner people?

A. Waggoner, yes.

Q. That was one of the early jobs you did bid on as the aabeta co.? [1269]

A. Yes, I am sure it was.

Q. Where was that? A. The job?

Q. Where was the job?

A. That was the Van Nuys Hospital in Van Nuys; I think that was the name of the hospital.

Mr. Black: I think that is all.

Mr. Ackerson: I just want to ask one question, your Honor. I will make it one.

Redirect Examination

By Mr. Ackerson:

Q. Prior to this termination meeting, Mr. Waldron, did Mr. Ragland ever at any time state to you or make the statement in your presence that you were not supposed to be doing business in Los Angeles? A. No, sir.

Mr. Ackerson: That is all.

Mr. Black: That is all.

(Witness excused.)

The Court: This particular case is now adjourned until tomorrow at 1:30. The Court until 1:30 today.

(Whereupon, at 12:25 o'clock p.m., Monday, May 23, 1955, an adjournment was taken to Tuesday, May 24, 1955, at 1:30 o'clock [1270] p.m.)

May 24, 1955; 1:30 P.M.

The Court: Proceed.

Mr. Black: At this time, if the Court please, I am going to call Mr. Lewis first just to lay a foundation for certain documentary evidence.

Will you take the stand, Mr. Lewis?

SIDNEY M. LEWIS

recalled as a witness by and on behalf of the defendants, having been previously duly sworn, testified further as follows:

The Clerk: Did we swear you previously?

The Witness: Yes, I have been sworn.

Direct Examination

By Mr. Black:

Q. Mr. Lewis, are you familiar with the prices prevailing for Flintkote acoustical tile during the entire period commencing in 1951 and ending up to the present time? A. I am.

Q. Are you also familiar with the nature of the merchandise sold by other dealers in this area of products similar to those made by Flintkote?

A. I am quite familiar with them.

Q. Did you examine a series of invoices produced by the plaintiffs in this case in order to assist the accountant in [1272] preparing a tabulation of those invoices? A. I did.

Q. Will you state precisely what you did in that connection?

A. Well, there were a group of invoices which

(Testimony of Sidney M. Lewis.)

had been rendered to the plaintiffs by Harbor Plywood—do you want the names of the companies?——

Q. These are the invoices?

A. ——and E. J. Stanton Lumber Company, in which there were a number of invoices rendered for materials.

I separated the invoices by dates and indicated on those invoices those items which were more or less and which we consider acoustical tile.

Q. And did you assist Mr. Bradley in determining the price to be charged by Flintkote for tile of that character?

A. I furnished copies of our price lists.

Q. To Mr. Bradley?

A. Which had been in effect during that time.

Q. And those price lists were correct?

A. Yes, sir.

Q. Are these the invoices that you examined—I show you Plaintiffs' Exhibit 40 for identification?

A. Shall I take them out?

Q. Just sufficient to identify them as the ones you examined. [1273]

A. (Examining exhibit): I saw those; yes, sir. Yes, I saw these.

Mr. Black: I think that is all.

Do you have any questions, Mr. Ackerson?

Mr. Ackerson: Just a couple.

(Testimony of Sidney M. Lewis.)

Cross-Examination

By Mr. Ackerson:

Q. Mr. Lewis, your testimony is based, then, upon your idea of the definition of acoustical tile, what you understand it to be?

A. What I understand it from my experience in the business, yes.

Q. In other words, what Flintkote purportedly——

A. And a knowledge of the business, yes.

Q. But you do admit, of course, that I am assuming that you are saying that acoustical tile is only tile that has holes punched in it?

A. Not necessarily.

Q. All right. I wanted to make that clear because I think you will admit that acoustical tile companies who probably didn't punch holes in it at one time or another still thought they were selling acoustical tile, didn't they?

A. Well, when non-perforated tile is sold, it is usually of a special low density nature, a special fiber.

Q. This is acoustical tile in the building, isn't it? [1274] It is at least considered so by the manufacturer? A. That is not tile.

Q. On the walls?

A. That is acoustical plaster, I think.

Q. You have noticed the halls out here, haven't you?

(Testimony of Sidney M. Lewis.)

A. That is a special acoustical tile, yes, sir.

Q. That is considered acoustical tile?

A. Yes, that is true.

Q. You stated that you were acquainted with Flintkote's prices during these years?

A. Yes.

Q. Are you also acquainted with the other manufacturers' prices for the same 12 x 12 one-half inch tile? A. We try to keep ourselves informed.

Q. You keep yourself informed?

A. That is right.

Q. They are by and large the same during those years?

A. To the best of my knowledge and belief.

That is all.

Mr. Black: One more question, Mr. Lewis.

Redirect Examination

By Mr. Black:

Q. In the catgory of acoustical tile you included everything that was sold by Flintkote on a direct basis to acoustical tile contractors, did you [1275] not?

A. Well, in this group of invoices there were some materials sold by the Harbor Plywood Company which was a perforated material and which is in a borderline category, I would say.

Q. But you put that into the category——

A. Of acoustical tile.

Q. ——of acoustical tile? A. Yes, I did.

(Testimony of Sidney M. Lewis.)

Q. You did not exclude that?

A. I did not.

Q. Even though it is not an AMA tile?

A. That is right.

Q. And did you include in acoustical tile everything that Flintkote sold direct to acoustical tile contractors? A. That is correct.

Mr. Black: No further questions.

Recross-Examination

By Mr. Ackerson:

Q. Do you know, Mr. Lewis, whether or not—I am asking your personal knowledge in connection with this testimony you have stated—there was any understanding as to whether or not plaintiffs would be restricted to your definition of acoustical tile, decorative tile, or whether they could buy it from Flintkote? Do you know that?

A. We only sell the perforated acoustical tile which [1276] we classify as an acoustical material, and which is only sold to contractors of the type of the plaintiffs. The non-perforated tile, regular insulating tile, we don't sell to the contractor trade. We sell to dealers and distributors only.

Q. You never sell that direct? A. No, sir.

Q. On a contractor, say, like Coast Insulating, if they wanted to buy a carload of tile and they needed maybe a border tile to go around the edge of a ceiling, is it your statement that Flintkote

(Testimony of Sidney M. Lewis.)

would make them buy that small amount of tile from a lumber company or somebody?

A. Yes, that is true. We do make a border tile which is a non-perforated tile of the same fiber which could be used for borders if they wanted to purchase it.

Q. And you do sell that, you would include that in a carload of tile?

A. It is a border tile and used in those cases.

Q. And it is listed on your price sheets?

A. That is right.

Mr. Ackerson: That is all.

Mr. Black: Thank you. That is all.

(Witness excused.) [1277]

Mr. Black: Mr. Bradley, please.

LOUIE M. BRADLEY

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated, sir.

Your full name, sir?

The Witness: Louie M. Bradley.

Direct Examination

By Mr. Black:

Q. What is your occupation, Mr. Bradley?

A. I am a certified public accountant.

Q. With what firm?

A. Lybrand, Ross Brothers & Montgomery.

(Testimony of Louie M. Bradley.)

Q. In what capacity are you connected with that firm? A. I am a supervisor.

Q. How long have you been connected with them? A. Approximately 15 years.

Q. How long have you been a certified public accountant? A. Approximately six years.

Mr. Black: I will ask, Mr. Clerk, that this tabulation and the supporting sheets be clipped together and marked for identification as Defendant's Exhibit next in order.

The Clerk: Defendant's K for identification.

(The document referred to was marked Defendant's Exhibit K for identification.) [1278]

Mr. Black: Mr. Bradley, I show you a tabulation headed "aabeta co., Purchasers of Acoustical Tile," and I will ask you if you can identify that document.

The Witness: Yes, those were prepared by myself or under my supervision.

Q. (By Mr. Black): Will you state what you did in connection with your preparation of that tabulation?

A. From the invoices that were supplied by the aabeta co., which would be these (indicating) in front of me, and taking the descriptions that were given to me by Mr. Lewis, as those—distinction between those which would be acoustical tile and other types of tile and other types of material, we prepared a list by years of those materials that were acoustical tile and those purchases that were

(Testimony of Louie M. Bradley.)

other than acoustical tile for the years 1952, 1953, 1954 and a portion of 1955.

Q. And that list is shown on those supporting schedules, is it not?

A. Yes, with the entire description of the item, using the unit price, the total price of the invoices, and then we—from the Flintkote price schedules we also compared those with the Flintkote unit price and total price.

Q. Now, would you kindly refer to the summary page, the top page of this and state what that refers to?

A. This is a summary of all the sheets we [1279] prepared, breaking down the purchases of acoustical tile between years, showing the actual purchases as shown by the invoices, and what they would have amounted to on Flintkote prices, and then another column on purchases of materials other than acoustical tile.

Q. Would you state for each year the amount actually paid for acoustical tile and the amount that would have been paid for Flintkote tile of that same character?

A. Yes. In 1952, the actual purchases of acoustical tile amounted to $11,654.35. At Flintkote prices, $10,059.60.

For 1953, the actual purchases would have been—were $31,499.57. At Flintkote prices, $27,275.65.

1954, the actual purchases were $21,000.01. Flintkote prices, $17,954.68.

(Testimony of Louie M. Bradley.)

In 1955, or a portion of 1955, the actual purchases were $2,603.02. Flintkote prices were $2,226.20.

Q. Now, what were the total purchases of acoustical tile for the entire period?

A. Actual purchases were $66,756.95.

Q. What was the excess price paid over the comparable price that would have been charged by Flintkote for the same commodity?

A. $9,240.82.

Q. That is for the entire period?

A. That would be for the entire period. [1280]

Q. What is the total of items other than acoustical tile purchased during that period?

A. The total was $20,635.00.

Q. Did you find in percentage the excess paid for the acoustical tile over the comparable price charged by Flintkote for the same material?

A. Yes.

Q. What was that percentage? A. 16.066.

Mr. Black: I shall offer this in evidence as Defendant's Exhibit K.

Mr. Ackerson: No objection, Mr. Black.

The Court: Received.

(The document heretofore marked Defendant's Exhibit K was received in evidence.)

Mr. Black: I will now ask the clerk, please, to mark this next schedule of three pages as Defendant's Exhibit L for identification.

(The document referred to was marked Defendant's Exhibit L for identification.)

(Testimony of Louie M. Bradley.)

Q. (By Mr. Black): I now show you another schedule captioned "aabeta co. Summary of Statements of Profit and Loss," and I will ask you to state what that document consists of.

Mr. Ackerson: What is that exhibit number?

Mr. Black: That is L for identification. [1281]

The Witness: This is a summary of the statement of profit and loss for the years 1952, 1953, and 1954.

It is a summary showing the total income, the cost of sales and the gross profit, operating expense and net profit for each year, each one of the years, 1952, 1953, and 1954.

The percentage that each one of those items bears to the income, which was at a hundred per cent.

Q. (By Mr. Black): From what information is that table compiled?

A. These were compiled directly from the books of the aabeta co.

Q. You didn't depend on any other information for that? A. No.

Q. Taken entirely from the books?

A. Yes, that is right.

Q. Is that right? A. Yes.

Mr. Black: I will ask this be offered in evidence as our Exhibit L.

Mr. Ackerson: No objection.

The Court: Received.

Mr. Ackerson: May I see that last document?

Mr. Black: Yes.

Mr. Ackerson: Are you through with it?

(Testimony of Louie M. Bradley.)

Mr. Black: Yes, through with that document. I now ask this document be marked Defendant's Exhibit M for identification.

(The document referred to was marked Defendant's Exhibit M for identification.)

Mr. Black: I think you have seen this, Mr. Ackerson.

Mr. Ackerson: Yes. No objection to that, Mr. Black.

Q. (By Mr. Black): I now show you this document marked Exhibit M for identification, and ask you to identify that.

A. This is a listing of the purchases of acoustical tile from The Flintkote Company by the aabeta co.

Q. And upon what information is that table based?

A. From copies of the invoices from The Flintkote Company to the aabeta co.

Mr. Black: I will offer this in evidence as Exhibit M.

Mr. Ackerson: No objection.

The Court: Received.

(The document heretofore marked Defendant's Exhibit M was received in evidence.)

Mr. Black: You may cross-examine.

Mr. Ackerson: I wonder if you would mind passing this Exhibit M to the jury after I cross-examine.

Mr. Black: Yes. You want it held up?

(Testimony of Louie M. Bradley.)

Mr. Ackerson: No. I just don't anticipate a long cross-examination. [1283]

Cross-Examination

By Mr. Ackerson:

Q. Nice to see you again, Mr. Bradley.

A. Nice to see you, Mr. Ackerson.

Q. Mr. Bradley, when you purported to segregate this acoustical tile from other materials, you took Mr. Lewis' construction as to what acoustical tile was? A. I did.

Q. You are not an expert in acoustical tile, are you? A. No.

Q. So Mr. Lewis told you to segregate this type of material and limit acoustical tile to this type of material, is that right?

A. Each one of the invoices were marked for my guidance.

Q. He marked them? A. Yes.

Q. In other words, each invoice said, "This is not acoustical tile. This is acoustical tile," or something to that effect? A. In effect, yes.

Q. Yes. So that by and large if there were some border units on it, why, was that acoustical tile, do you know?

A. I don't believe I would be able to answer that question. [1284]

Q. In other words, you just took Mr. Lewis' notation and tabbed it up.

A. Yes, that is right. [1285]

(Testimony of Louie M. Bradley.)

Q. Now you came up, as I remember it, with a figure of 16 point something, the percentage that plaintiffs paid for tile over and above that which they would have paid to Flintkote, is that right?

A. Yes.

Q. Now in that connection, Mr. Bradley, what did you do, take each purchase of tile that the plaintiffs bought and then from that you took the price sheet of Flintkote and you computed what each purchase would have cost in each category?

A. That is right.

Q. Without regard to carload lots or less than carload lots?

A. The pricing—the Flintkote prices were based entirely on carload lots.

Q. That is what I wanted to find out. But you still came up with a figure of 16 per cent plus?

A. Yes, that is correct.

Q. Higher than they would have paid Flintkote?

A. Yes.

Q. I am going to hire you after this. We are one-tenth of a per cent off in our estimates.

Now on this Exhibit L, Mr. Bradley, you have a net profit figure here which varies. It says 1952 the net profit figure was 5 per cent, '53 it was 11 per cent and '54 it was 5 per cent, is that right? [1286]

A. Yes, that is the percentage on the income figure.

Q. On the income figure? A. Yes.

Q. Now do you know whether or not that profit

(Testimony of Louie M. Bradley.)

included—I mean before you arrived at that profit, was there a sales commission deducted?

A. From those figures I have there, I would have to look at the detailed profit and loss figures. Those are summary figures on this only.

Q. Then you can't tell from this exhibit whether or not this was really the total profit after labor and materials and overhead or whether it was net profit exclusive of a sales commission?

A. Well, it is the net profit as shown by the records of the aabeta company, and if those expenses of the aabeta company included the sales commissions, they would be in there.

Q. But you don't know if they are in there or not?

A. If I saw the detailed profit and loss statements I would be able to tell you, I believe.

Q. But you don't know whether that factor was taken into consideration here in this Exhibit L or whether it wasn't? You have to look at the books again. You can't state in your own mind now?

A. I do not recall exactly, that is correct. [1287]

Mr. Black: I think the 1952 figures may be there, Mr. Ackerson. You might ask him that.

The Witness: Was that one of those schedules that was included?

Mr. Black: I think so.

Mr. Ackerson: I don't know. I didn't mean to obscure anything. I just wanted to know.

The Witness: There is an item here in 1952 of

(Testimony of Louie M. Bradley.)

commissions, yes, in the amount of—well in excess of $3,000 for the year 1952.

Q. (By Mr. Ackerson): Do you know what percentage that would be? Can you tell?

A. Based upon sales?

Q. Yes.

A. It would be approximately 3 per cent.

Q. What about the next year, '53, is there anything for '53 or '54 along that line?

A. The reason we have a detail for 1952 was that I believe the records that were submitted included an income tax return that showed the detail of the profit and loss statement.

In 1952 there was none included so we prepared our own from the records.

Q. What do you have on that line that says whether or [1288] not sales commissions were deducted prior to the arrival of these net profit figures for 1953 and '54? Is there anything on that exhibit that would indicate that?

A. Nothing on this exhibit that you hand me here, no.

Q. And you recall nothing from memory?

A. I would have to say on that, no.

Q. Now, Mr. Bradley, did you treat this extra 16 plus per cent, or 17 per cent, let us call it—you said it is 16 per cent plus so we will call it either 16 per cent or 17 per cent mark-up—that is, the excess price they paid at the lumber yards and to Stanton, of course that figured in this too, didn't it, in arriving at the net profit figure?

(Testimony of Louie M. Bradley.)

A. That is correct.

Q. So that you are unable to state from this exhibit whether or not these figures, the 5 per cent net profit for '52, 11 per cent net profit for '53 and 5 per cent net profit for '54, was over and above a sales commission payment for each of those years?

A. I would only be able to say that for 1952 the expenses do include commissions.

Q. Of about 3 per cent?

A. Approximately 3 per cent.

Q. For the other two years you don't know, do you? A. I do not know.

Q. So that as far as '53 and'54 are concerned, this [1289] 11 per cent and 5 per cent may be the total gross profit exclusive of materials and actual installation and such, and irrespective of sales commissions or otherwise?

A. Well, it would be the figure reflected on the aabeta company and whatever they showed as expenses they were included.

Q. But from this exhibit you don't know exactly whether they are included or not, do you?

A. That is right.

Mr. Ackerson: Now, is the jury through with Exhibit M? I wonder if I could borrow that just a moment and I will hand it back.

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Ackerson): This Exhibit M purports to be only the total amount of tile purchased

(Testimony of Louie M. Bradley.)

by aabeta company from Flintkote during the year 1952, is that right? A. That is correct.

Q. Can you tell from this exhibit or from your own memory whether or not aabeta paid the same price for these two small orders of tile that they paid for the first order of tile? Did they pay at the same rate per square foot or anything? Can you tell that, Mr. Bradley?

A. You mean the purchases from Flintkote?

Q. Yes. Were they all at the same price per square foot?

A. For the material shown here, the ½ x 12 x 12 was all apparently purchased at 10 cents per square foot.

Q. And the ¾, 12 x12?

A. That was at 14 cents a quare foot.

Q. All of it?

A. Yes. There was just one purchase of ¾ inch.

Q. And these two other little items here on 3-22-52 and 5-9-52, do you find they were approximately the same price, or the same price?

A. Well, apparently there is a difference in cost between the slow burn acoustical tile and that which is not. Slow burn carrying a higher price, and that was at 13 cents a square foot.

Q. So you found those latter two small orders, aside from the first carload order, were for a different style and type of tile, didn't you? A. Yes.

Q. One was slow burn? A. Yes.

Q. And the other, I think, was a different size altogether, wasn't it? A. Yes, correct.

(Testimony of Louie M. Bradley.)

Mr. Ackerson: Mr. Black, what was that Exhibit L? [1291] I wonder if I may have Exhibit L?

Mr. Black: L was the profit and loss exhibit.

Mr. Ackerson: You had a previous exhibit, did you not?

Mr. Black: We had K, analysis of invoices. The jury has K.

Mr. Ackerson: I don't need that.

Q. (By Mr. Ackerson): Did you find, Mr. Bradley, that the aabeta books you examined by and large were kept according to fairly good accounting practice?

A. From the cursory examination we made of them, they apparently balanced.

Q. As good accounting practice, acceptable accounting practice? A. Yes.

Mr. Ackerson: We won't compare it with Lybrand & Ross, but it was acceptable. That is all.

Redirect Examination

By Mr. Black:

Q. I have one question, Mr. Bradley.

Mr. Black: Mr. Ackerson, do you recall where the profit and loss statements, do you recall where they are? I think they were simply offered for identification, other than the 1952 one which we offered. They were made available, along with those income tax returns.

Do you know where they are? [1292]

Mr. Ackerson: I don't, Mr. Black, and I don't have them in court. I know they were here at one

(Testimony of Louie M. Bradley.)

time. I don't know whether they were marked for identification or not.

Mr. Black: That will readily clear up this matter of commissions.

Q. (By Mr. Black): Are you able to quickly look at this book and determine——

A. I believe I would.

Q. ——for '53 and '54 commissions were included.

I now show you the ledger. I don't want to take up too much time, but if you are able to do it quickly from that, please do so.

A. I think I will be able to. Yes, I have the account, commissions paid, in front of me now.

Recross-Examination

By Mr. Ackerson:

Q. Does that show sales commissions? I assume that is what it means, does it?

A. I would presume so. However, they apparently were by pencil notation here paid to William Yeomans.

Q. Is that the type of commissions you referred to? A. Yes, this is the——

Q. Is that also true on the '52 schedule?

A. Yes. The amount shown on the '52 schedule is the amount shown on the ledger here (indicating).

Q. As being paid to William Yeomans?

A. There are apparently smaller amounts paid

(Testimony of Louie M. Bradley.)

to other individuals. The other large amounts, in excess of $3,000.00, were paid to Yeomans.

Q. Is there any way we can identify that as to page number?

A. It comes from a Journal 13, which would be one of the original journal entries here.

Q. Let's mark that. That, other than the so-called commissions you refer to were paid to William Yeomans, do you see any other commissions that you might have considered as sales commissions in that book?

A. From looking at the account I am afraid I wouldn't be able to tell whether they were sales commissions or any other type of commissions.

Q. When you spoke of sales commissions, these payments to Yeomans in '53, commencing January 31, '53, are the principal commissions you were talking about, is that right?

A. These would be the ones that would show as commissions on the profit and loss statements.

Q. So that your net profit figures would have taken into consideration only these items paid to William Yeomans?

A. During 1952 and 1953, yes.

Q. I only see 1953 on this page.

A. 1952 is right immediately above [1294] (indicating).

Q. I see. And that is the amount of $3,002.97, is that right?

A. The amount apparently paid to William Yeomans, from the records.

(Testimony of Louie M. Bradley.)

Q. Those were the items that you took into consideration as sales commissions, if they are sales commissions? A. As commissions.

Q. And no others? A. That is right.

Mr. Ackerson: That is all, Mr. Black.

Mr. Black: Thank you, Mr. Bradley.

(Witness excused.)

Mr. Black: The defendant rests.

Mr. Ackerson: I would like to call Mr. Lysfjord briefly.

ELMER LYSFJORD

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Ackerson:

Q. Are you more closely associated with the business operations, Mr. Lysfjord, and bookkeeping methods of your company than is Mr. Waldron, would you say? A. Yes, sir.

Q. That is part of your duties down there, isn't it? [1295] A. That is correct.

Q. You have heard the preceding witness refer to an item in 1952 of $3,000.00 or more paid to William Yeomans.

Is that the same man that has been mentioned here as having been employed by you?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. What are his duties?

A. Well, he acted as our superintendent, a function that covers the placing of men, checking of jobs and placing the—or, rather, telling the truck driver what materials were to be delivered to certain jobs, and at sometimes doing the delivery and the work himself.

Q. Did he have anything to do whatever with sales of acoustical tile jobs to general contractors?

A. No, sir.

Q. Would you say that any payments you made to him had anything to do with sales commissions then? A. None whatsoever.

Q. And would that be true also in 1953?

A. Yes, sir.

Q. And '54? A. Yes, sir.

Q. In other words, he was always your construction superintendent? A. That is true. [1296]

Q. Supervisor, and so on? A. Yes.

Q. He had never anything to do with sales?

A. At no time.

Q. You never paid him any sales commission of any kind, did you? A. No, sir.

Q. Now, Mr. Lysfjord, to your knowledge—you are acquainted with this ledger, are you not (indicating)? A. I am acquainted with it.

Q. I am referring, for the purpose of the record, and we have been referring to Plaintiffs' Exhibit 42 for identification.

Both with respect to Mr. Bradley and Mr. Lysfjord.

(Testimony of Elmer Lysfjord.)

Are you acquainted generally with this?

A. Yes, sir. [1297]

Q. Do you work with it as partner in the aabeta company?

A. I worked with it in conjunction with our accountant.

Q. But you are acquainted with the general make-up of it? A. Yes, sir.

Q. Do you know whether or not, Mr. Lysfjord—and let's assume that this Exhibit L, Defendants' Exhibit No. L, is correct mathematically—I am going to call your attention to the net profit figures on the bottom of the tabulation there. Can you state whether or not those net profit figures of 5 per cent, 11 per cent and 5 per cent were net profit, the profits for those years after deduction of sales commissions of any kind?

A. I don't believe I could answer that at all in the percentage bracket because in the operation of our company we never did break it down to a percentage relation one to the other.

Q. Can you tell us whether those figures of 5 per cent, 11 per cent and 5 per cent for the respective years included all of the profits for those years? I am not talking about the percentage, I am asking you to assume that those percentages are right. Did you or Mr. Waldron receive any additional compensation other than that by way of salesmen's commissions, for instance? [1298] A. No, sir.

Q. In other words, that was the profit you made for those three years?

(Testimony of Elmer Lysfjord.)

A. If I understand your question correctly, I am assuming that these figures are correct.

Q. I want you to assume that for purposes of answering the question.

A. Then they would have to reflect exactly what you mentioned.

Q. They would not reflect any additional sales commissions to either you or Mr. Waldron?

A. That is correct.

Q. That would be the profit you made?

A. That would be the profit.

Q. From the entire operation?

A. Yes, sir.

Q. Mr. Lysfjord, can you state whether or not or what effect—state, first, whether or not after you were terminated from The Flintkote Company's source of supply, whether or not you could or did continue to bid as you had theretofore on acoustical tile jobs. A. No, sir, we couldn't.

Q. Can you explain why?

A. Well, the additional premium that we had to pay for our materials offset the amount of mark-up that we could get [1299] for the job to make it worth our while to do the work. You see, we don't make the prices that we could get the work for, our competition does that, and by paying this extra premium sometimes we couldn't even make a profit on the job at all, so we couldn't bid some of those that we had in the past.

15 per cent or 17 per cent is a considerable amount

(Testimony of Elmer Lysfjord.)

of money when you bring it right down to talking about 5 per cent and 11 per cent.

Q. Did you on occasion bid jobs then for little or no profit?

Mr. Black: That is objected to as leading.

The Court: Sustained.

Q. (By Mr. Ackerson): Did you as a result of being cut off from Flintkote or after your line of supply from Flintkote was no longer assured, did that fact have any other effect upon your being able to bid on acoustical tile contracts?

A. Very much so. We had no idea whatsoever, even if we did bid and were successful in getting the work, regardless of the profit angle, as to the availability of this material to us.

Q. Is it necessary that you have an assured source of supply in order to bid successfully on jobs, large jobs?

A. Absolutely. Whenever we bid, that is actually a verbal contract for us to fulfill, and if we are not able to [1300] fulfill the contract the general contractor has a right to call in anybody that he pleases to finish the job and charge us for the difference.

Mr. Ackerson: I think that is all. Mr. Black, you can cross-examine.

(Testimony of Elmer Lysfjord.)

Cross-Examination

By Mr. Black:

Q. Just one item, Mr. Lysfjord. You mentioned six or eight months ago bidding on a $60,000 job or thereabouts on a 50 per cent mark-up, and losing that job to the successful bidder who was only $200 or $400 below you. That is the fact, isn't it?

A. I recall talking about it. Those exact figures I am not too sure of.

Q. You were pretty exact, weren't you, when you testified or were you merely estimating?

A. I was probably pretty exact. I told you at the time that if you were interested I would get the exact figures for you.

Q. That was a junior college job, was it?

A. I believe so.

Q. And you bid up 50 per cent over your estimated cost of that job? A. Yes.

Q. And it was a $50,000 or $60,000 job, or that amount [1301] of tile in it?

A. I think the whole job was that, not just the acoustical tile.

Q. You apparently had an assured source of supply when you put in that bid, didn't you?

A. I would say we did.

Mr. Black: That is all.

Mr. Ackerson: That is all.

(Witness excused.)

Mr. Ackerson: May we approach the bench, your Honor?

Mr. Black: I think that it would be wise to excuse the jury for a short period as we have some motions to make.

The Court: Members of the jury, you may go to the jury room.

Mr. Ackerson: I am going to rest except for one point, your Honor, and you can consider that I have. But after the jury has retired I will point out the remaining point.

The Court: Very well. The jurors have now all left the courtroom and the door is closed behind them.

Mr. Ackerson: We might as well get this formality out of the way first. There is what might be termed a technicality and also a substantiality, your Honor.

According to Exhibits 38 and 39, and lined up with the complaint, for whatever it is worth, it indicates that the prayer in the complaint should be amended to conform with the [1302] evidence, and I deem that this is probably the right time to do it as a procedural matter, although it is my understanding that it can be done at any time before or after. But in any event the complaint reads, after alleging that these injuries were suffered, the loss of good will, capital investment, actual and potential profit, and so forth, that it will continue, it charges that up to the date of the filing of the complaint the plaintiffs have been damaged in the sum of $100,000.

Then the prayer is for three times that amount in the usual form.

I don't think that Mr. Black has any objection with this, and I think it should be done out of the presence of the jury, because I don't think that any claims in the complaint have any evidentiary value as far as the jury is concerned, but that figure of $300,000 I ask be amended by interlineation or permission for a subsequent formal amendment to $466,251 to conform to Exhibits 38 and 39. [1303]

Mr. Black: We have no objection to the amendment being made in an informal manner. But the court will recall that we have objected to the introduction of Exhibits 38 and 39 on the basis they are based entirely on speculation, and without prejudice to that position we consent that the method of amendment may be adopted.

The Court: Mr. Ackerson, will you interline the Complaint? I take it you are referring to the Amended Complaint?

Mr. Ackerson: The Amended Complaint and only in the prayer, your Honor.

The Court: Interline it so that it reads the way you wish it to read in this regard. And do it here in the presence of the clerk, who will initial it.

Mr. Ackerson: Thank you.

Mr. Black: At this time, if the Court please, we wish to renew our motion for a directed verdict in favor of the defendant on the same grounds urged and on the points and authorities submitted in support of the motion made at the conclusion of the plaintiffs' evidence, on the ground there is no

evidence connecting the defendant to a knowing participation in a conspiracy that is competent.

And in this connection, we renew our motion to strike the testimony of the plaintiff Lysfjord as to Mr. Ragland's alleged admission contained in pages 381 and 387 of the transcript. [1304]

We urge the same grounds, we rely on the same points and authorities and make merely this observation: that there is certainly nothing in the way of additional evidence produced by the plaintiffs which, in any way, supports any theory of knowing participation in a conspiracy.

We do not intend to reargue the matter, because we rely on the same authorities and the same argument heretofore made.

The Court: Believing there is sufficient evidence to create a jury question, the motion is denied. The motion to strike is also denied.

Mr. Ackerson: With that, the plaintiffs will rest, also, your Honor.

The Court: You have some further evidence, Mr. Ackerson? I thought you said that you had something that would be brief.

Mr. Ackerson: I called Mr. Lysfjord, and I think that is what I had in mind.

The Court: All right. This matter of when damages terminate, if indeed damages begin, they terminate with the filing of the complaint—I mean do they stop accruing at that time, in the absence of supplemental amended complaint?

I think that the cause of action is based on tort and that damages, if they are certain to result, even

if they have not yet accrued, would be collected under this amended complaint, provided that the case is made out. [1305]

But judges are sometimes wrong in their understanding of these things, and I suggest that the jury be instructed in the event there be a verdict in favor of the plaintiffs, that they compute the damages down to the day of the filing of the amended complaint. And then compute separately damages from that date on. So that we will have separate computations and can deal with it on motions as a matter of law later on.

Mr. Ackerson: I have no objection to that, your Honor. It certainly would eliminate the necessity for any additional trial later on, in the event of error on the part of the court or either counsel.

I have no objection to that. I think the Exhibits 38 and 39 were designed to make that possible, even though I felt at the time there was no doubt about it, I knew that the contention had been raised.

I don't suppose it would be very difficult for the jury to use plain two by two mathematics and be able to make that line of demarcation from those exhibits.

Mr. Black: I think the Court perhaps overstated our position slightly. Our position, to state it again, is that we concede, in the event of liability, we would be liable for refusing to sell or failure to supply tile up to the time of the filing of the complaint, even though that damage occurred later.

But not merely damage actually sustained up to the filing [1306] of the complaint, but damage re-

sulting from the refusals to supply tile up to that date.

If the distinction is clear, I think that is the position we take in the matter.

Mr. Ackerson: I believe I have talked with Mr. Black and Mr. Doty and that was my understanding, your Honor, that if it is shown that the effect of any acts taken prior to the filing of the complaint continued on, just as I argued before, that it could come on down to the date of the trial. If I am correct, is that what you stated, Mr. Black?

Mr. Black: Not quite that much.

Mr. Ackerson: In other words, if it arises out of an act for which your client is liable. It occurred prior to the filing of the complaint.

Mr. Black: That is right.

Mr. Ackerson: Then the damages could come on down——

Mr. Black: That is correct.

Mr. Ackerson: ——to the present time. And I think that is what your Honor has already ruled on. Maybe——

Mr. Black: No.

Mr. Ackerson: I think that was his Honor's first ruling. If that is the case, then I don't see any reason for asking for two verdicts from the jury, your Honor.

Mr. Black: There very definitely is. There very definitely is. [1307]

Mr. Ackerson: Maybe I don't understand then, Mr. Black.

Mr. Black: Well, our position is that the cases

establish, in a situation of this kind, where there is no single piece of property, such as a lease or what-not, that a refusal to sell is implied in law as a continuing refusal to sell. And that damages resulting from failure to supply tile up to the filing of the complaint is all that can be recovered in this action.

Now, that damage may have continued for some period after the filing of the complaint, but it must be based on refusals to supply tile only up to that date, on our theory.

On your theory, as I understand you, you contend that the failure to supply tile right up to the time of the trial is the basis for all damage that can be recovered in this action.

Mr. Ackerson: We can't make each other understand, Mr. Black. No. My theory is this: That there was only one refusal to supply tile. That occurred along about February 19, 1952. From that one refusal, under the evidence in this case, there was continuing damage right down to date, and into the future. His Honor has taken care of the future damage, because he has pointed out that that is a matter for injunctive relief.

But otherwise, I don't see we differ any. I don't care whether it is one refusal or continued refusals up to the [1308] date of the trial. I say it was the one refusal on February 19, 1952, that caused all the damage, that may continue indefinitely, but which, by ruling of the Court, has been stopped so far as the jury is concerned, up to the date of the trial. In fact, the damage figures, by and large,

go to estoppel a couple of months ahead of that. That is my understanding, Mr. Black.

But either of our statements, I can't see the reason for a special instruction to the jury, your Honor.

Mr. Black: We can.

Mr. Ackerson: Maybe I am not understanding. I don't believe there is a necessity for it now.

The Court: Mr. Black, you haven't submitted one, have you?

Mr. Black: What did you say?

The Court: You haven't submitted it?

Mr. Black: Yes, we submitted an instruction on that point.

The Court: That one escapes my recollection.

Mr. Black: Instruction 46.

Mr. Ackerson: Have you submitted your revised instructions, Mr. Black?

Mr. Black: Yes, we have submitted them.

Mr. Ackerson: I have some to submit to your Honor. I told you I would revise some of the instructions, that I [1309] have given you, and I have added two or three instructions. But I haven't had any chance to examine Mr. Black's latest additions.

I understood that he had agreed to withdraw these instructions we are talking about relating to——

Mr. Doty: Not that one.

Mr. Black: Not that one.

Mr. Ackerson: I see.

Mr. Doty: On the $20,000.00——

Mr. Ackerson: I think that is a matter of your

Honor adopting one instruction as against the other.

I believe the date is there from which the jury could derive the damages. After Mr. Black's statement today and my own, I have my doubts it is necessary. I can't see that it makes a great deal of difference.

Mr. Black: We believe our difference is substantial and poles apart, Mr. Ackerson.

The Court: Do you want to submit a form of verdict to cover the particular point?

Mr. Black: I think it could be covered by instructions to find separately.

The Court: Well, if they are going to find separately they will have to state it separately in the verdict. Do you want to draw up a form of verdict?

Mr. Black: We can. [1310]

The Court: If you will I will at least have in mind how you would like to have it found. [1311]

Mr. Black: Yes, I am sure we can state that.

Now, does your Honor wish to proceed with the argument at this time or settle the matter of instructions at this time?

The Court: The settlement of instructions is always a difficult problem. It all too often bogs down into the niceties of language, and we find that instructions that are finally given are given more with an idea to appellate decision language than to helping the jury here.

There are over a hundred proposed instructions and some of them quite long. I suppose it would

take a full court session if they were all given. I am wondering if, since there isn't a great deal of conflict—each side has in some instances asked for the very same instruction—if the court cannot simply read the charging language of the amended complaint, the relevant portions of the statute involved, give the classical definition of conspiracy and the necessity of finding that this defendant was a member of the particular conspiracy, and then get into damages doing it as best I can as a condensation from these long instructions you have given, and then call upon you to state your exceptions and if I have left anything out I will try to give it.

That is what we have done generally in other cases, but this is the first antitrust case I have had to go to the jury.

Mr. Black: I think we can work out some such formula. [1312]

Mr. Ackerson: I don't see any objection to that, your Honor.

I do have, as I say, some revisions and I think one or two additional instructions on damages, which would be up to your Honor to decide whether they were necessary or whether you wished to give them, and if I think you should, of course, as your Honor says, I can object and so state at the time.

The Court: Do you have any objection to proceeding with your argument now?

Mr. Ackerson: No, I have no objection.

The Court: Let us take a short recess and then we will hear argument and if you get through early

enough we will hear Mr. Black, but I doubt if we will get to his today.

Mr. Black: I would think it would be wise to limit ourselves to some specified time, if the court please, because it is always unsatisfactory to have unlimited time in a situation of this sort.

The Court: What limitation do you suggest?

Mr. Black: I would be quite content with an hour or an hour and 15 minutes a side.

Mr. Ackerson: Well, your Honor, I had thought that I would try to finish opening and closing in somewhere around an hour and a half.

Mr. Black: That will be all right. [1313]

Mr. Ackerson: But I find I am simply unable to follow a prepared argument or memorized one and I think the case is sufficiently important so for the sake of another half hour on each side that we shouldn't do anything except try to limit ourselves on that. I don't want Mr. Black to limit his argument, either.

I would hate to have your Honor say an hour and 15 minutes or an hour and 30 minutes if two hours was deemed advisable or necessary. After all, we have taken up the court's time for over two weeks now and the jury's time and I don't think we ought to be bound now by 30 minutes or an extra hour.

So I would suggest—I think Mr. Black and I will both try and limit ourselves as to what we think is practical—after all, we are not going to talk ourselves out of the jury, if we can help it.

The Court: Well, neither of you have shown signs of being unduly prolix in argument so I think

we can leave it to your discretion, but if either of you want us to call you after a certain period of time, we will.

Mr. Block: I think it might be well to strive to keep within limits such as I have suggested because otherwise we are just apt to get out of control on a thing of this sort.

The Court: I should hope that the argument would not require more than an hour and a half for each side.

Mr. Ackerson: I doubt that it would, your Honor. I [1314] just don't like the idea, after having spent this much time, of trying to work against a deadline of 30 minutes or something like that after two or three weeks of trial. I will try very hard to keep it within an hour and a half. It may be less time than that.

The Court: Then the court will express a hope that you both succeed in containing your thoughts within the stated time though I won't impose it as an absolute rule.

Mr. Ackerson: Very well. I think you can depend on both of us to do that.

The Court: We will have a short recess.

(Short recess.)

The Court: The plaintiff will now make his opening argument. The plaintiff has two arguments to make. The first one is supposed to be the complete argument, but then the defendant makes his argument and any new matter which is injected in the defendant's argument may be replied to by the

plaintiff in his close. So this will be Mr. Ackerson's principal argument. [1315]

* * *

The Court: We will hear the defense argument tomorrow. [1367] You don't want to begin now?

Mr. Black: I much prefer not to start for 10 minutes.

The Court: You could hardly get started——

Mr. Black: Yes.

The Court: ——before recess time, which is upon us.

We will convene this case tomorrow afternoon at 2:00 o'clock, instead of the usual 1:30.

(Whereupon, at 4:40 o'clock p.m., Tuesday, May 24, 1955, an adjournment was taken to Wednesday, May 25, 1955, at 2:00 o'clock p.m.) [1368]

Wednesday, May 25, 1955—2:20 P.M.

(Whereupon, the following proceedings were had in the court's chambers, outside the presence and hearing of the jury.)

The Court: Instructions?

Mr. Black: We have been stuck with a problem, your Honor, last night, until long hours and reluctantly came to the conclusion we just didn't see any way in which that could be accomplished for this reason:

That the two conflicting theories between Mr.

Ackerson and ourselves are basically different conceptions in law.

The issue just, as we see it, can't be submitted in the alternative without attempting to submit two unreconcilable theories of law to the jury.

The Court: I just about came to the same conclusion during the evening.

Mr. Ackerson: I was trying to say that yesterday. But I didn't think Mr. Black and I were far apart.

I told Mr. Black last night, when he called me, that I thought there should be a single verdict, too, your Honor.

The Court: Well, then, we will submit the single verdict, which will compensate for all damage for acts done prior to the filing of the Amended Complaint.

Mr. Ackerson: That is what I think should be done. [1370]

The Court: I suppose the jury should be instructed that if they find for the plaintiffs, that the court would then restrain the commission of further acts of the same character, so that they would appreciate that diminution in damage in the future.

Mr. Ackerson: Well, yes.

Mr. Black: That, however——

Mr. Ackerson: I think that was your Honor's ruling before. I mean there is a request for injunctive relief, and upon a proper showing the court has the power to restrain any future damage, and they don't have to consider that.

Mr. Black: That is correct. But I think an ele-

ment in that relief would be proof of the continuing conspiracy.

The Court: Yes.

Mr. Ackerson: Oh, yes, that would have to be shown.

Mr. Black: The jury doesn't have to concern themselves——

Mr. Ackerson: But they don't have to concern themselves with that.

The Court: The only way in which I think the jury is concerned with it is this: If we say, "Now, jury, you are going to assess all damages that are certain to be suffered by the plaintiffs, as a result of acts done prior to the certain date," and if the court then is going to minimize—well, that isn't going to work out, either.

We can't minimize the damages from the acts which have [1371] been done, if those acts were, in fact, tortious. All we can do is prevent, by restraint, the commission of new acts, which would give rise to new damage.

Mr. Ackerson: Therefore, you would chop it off?

The Court: We have to be careful and not instruct in fields which indicate to the jury anything from which they could gather there is——

Mr. Black: Yes.

The Court: ——a damage which they are to find.

Mr. Black: I think that is right.

Mr. Ackerson: I agree with that.

Mr. Black: I think perhaps it would be dangerous to suggest to the jury the matter of injunctive

relief, because that is solely in the court's discretion. I think it might tend to confuse them.

The Court: You would rather I didn't mention that at all?

Mr. Black: I would rather it wouldn't be mentioned.

Mr. Ackerson: It doesn't make any difference to me.

Well, I would think that you would want an instruction, Mr. Black—I am merely suggesting this —in view of injunctive relief asked, that any damage beyond the date of trial they need not consider. But I don't—whatever way you want it.

Mr. Black: Yes. [1372]

Mr. Doty: We wouldn't need to bring in the injunctive relief.

Mr. Ackerson: No, not necessarily. But I would agree——

Mr. Doty: They can't find any damages after the date of the trial period.

Mr. Ackerson: I would agree to that.

The Court: All right.

Mr. Doty: We still don't think that is the correct instruction, of course.

The Court: Well, we are going to have to be careful and not give the jury the idea the court is instructing them to find a particular way.

Mr. Doty: Yes.

Mr. Black: That is right.

Mr. Ackerson: That is right.

The Court: I want the instructions to be correct and helpful, but bland.

Mr. Black: Oh, yes.

The Court: It is awfully hard to keep these things bland and keep enough life in them to keep the jury awake.

Mr. Ackerson: It is going to be a problem. These instructions in any antitrust case, I think, are a problem.

I think both Mr. Black and I will—we have submitted all the ideas we have on the matter. I don't think there is too much conflict. [1373]

I haven't frankly scrutinized your last document carefully, Mr. Black. I think, as I understand it, it eliminates a great deal of the conflict.

Mr. Black: I haven't seen your recent set. We have a good many objections to your instructions, Mr. Ackerson.

Mr. Ackerson: I have some objections, too, but I mean it is a question that the court has to decide for itself, anyway.

The Court: So many of these instructions give language which is practically the case language, and the language of decision is often not appropriate instruction language.

Mr. Black: I think that is so.

Mr. Ackerson: I think I could agree with that, too. But I mean it is usually contemplated that—at least, I contemplate it that the judge is going to revise the language to suit the occasion. Perhaps the thought is best expressed by judicial language.

The Court: Well, I will do the best I can with it. An antitrust case is, under any circumstances, a difficult case to try for everyone——

Mr. Black: Yes.

Mr. Ackerson: Yes, it is.

The Court: ——the witnesses, counsel, the judge and the reporter. [1374]

(The following proceedings were had in open court in the presence of the jury.)

The Court: We will now hear the defendants' argument and not place any time limit unless you wish me to, Mr. Black.

I will also leave it to you as to whether we take a recess and, if so, when, that is insofar as your argument is concerned. If your voice gets tired and you would like to have a recess, we will take it. Otherwise we will let your argument be had in full and then take a recess before we hear the rebuttal.

Mr. Black: Thank you, your Honor. [1375]

* * *

The Court: We will take a recess before we have the closing argument for the plaintiffs.

(Short recess taken.) [1423]

The Court: Counsel, will you please step around to the side bench?

(Whereupon the following proceedings were had in the presence but out of the hearing of the jury.)

The Court: With respect to the proposed instructions, you have proposed one, Mr. Black, that talks about the covenant not to sue.

Mr. Black: We withdrew that.

The Court: Is that withdrawn?

Mr. Black: Yes.

The Court: It says it has been shown in evidence and so on, and I can't recall that the covenant not to sue——

Mr. Black: No.

Mr. Doty: That has all been withdrawn.

Mr. Black: We withdrew that by arrangement with your Honor before the trial.

Mr. Ackerson: I think we withdrew all instructions with reference to the settlement.

Mr. Doty: Yes. There were two and they were both withdrawn.

Mr. Ackerson: There were two or four or five, weren't there?

Mr. Doty: There were two. Both were withdrawn.

The Court: There will be no need to mention that?

Mr. Ackerson: No. [1424]

Mr. Black: No.

The Court: There will be no need to mention treble damage. There were some instructions that mentioned it and the statute mentions it, but I had intended not to read that part of the statute, and I don't think the jury has any idea there is such a thing.

Mr. Ackerson: No, I don't think it is any of their business. I think we agreed any settlement has been withdrawn. I don't think that is their business, either.

The Court: In the form of verdict, do you agree

that the verdict runs to the plaintiffs jointly, in the event there be a plaintiffs' recovery? That is, one verdict.

Mr. Black: Yes.

Mr. Ackerson: Yes, there is no reason for any other.

The Court: I should have asked you about these things at the close of the argument, but I might have forgotten it and then I would have thought of it perhaps at the beginning of the giving of the charge, and I didn't want that to happen.

(Whereupon, the following proceedings were had in the presence and hearing of the [1425] jury.)

* * *

The Court: Counsel, one other thing I forgot to take up with you. Will you step over here for a moment, and the reporter? [1457]

(The following proceedings were had with court and counsel at the bench outside the hearing of the jury.)

The Court: Very often jury deliberations in cases of this type are somewhat protracted. The case has taken considerable time to try. I always hesitate to apply anything which might be deemed coercive toward the jury or which might have that effect.

I wonder if you care to stipulate that if the jury does not arrive at a verdict by the close of the regular court day tomorrow that they might separate under an appropriate admonition and return to resume their deliberations the following day?

Mr. Black: Yes.

Mr. Ackerson: Surely.

The Court: I think it is much better than locking them up and keeping them here all hours.

Mr. Ackerson: That is perfectly all right, your Honor.

Mr. Black: Certainly. [1458]

(The following proceedings were resumed in open court.)

The Court: Members of the jury, we will begin tomorrow morning at 9:00 o'clock so that the instructions can be completed and you may have the full day for deliberations. You cannot go out for lunch, you have to stay here until you decide the case. Tomorrow morning at 9:00 o'clock instead of the usual 9:30.

However, if you do not arrive at a verdict by the close of the regular court day we will not keep you into the evening hours. That is, don't cancel any of your social engagements for tomorrow evening, because we will simply have you come back the following day if you have not arrived at a verdict by the ordinary adjournment hour tomorrow.

So you are now excused until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:05 o'clock p.m., an adjournment was taken until 9:00 o'clock a.m., Thursday, May 26, 1955.) [1459]

Thursday, May 26, 1955—9:00 A.M.

The Court: This has been a rather long case, members of the jury, and not the type with which you are jurors would be particularly experienced in, but generally rules of evidence and the like, which apply to one case, apply to another.

I will try to give you a good set of instructions and if, in your deliberations. you find you need some more, come back and we will undertake to clear up any matter of law that might be bothering you.

Ordinarily, if a case of this length, this involved. were tried before a judge, the judge would say, "I will take it under submission," and he would then have a lot of time on days when there are no trials and on week ends and the like to think about it, and to examine exhibits and come to a decision. I have cases that I have had under submission for almost three months, but you, as jurors, can't do that.

What is supposed to take the place of lapse of time, in letting things shake down in your mental processes, is that you will talk to each other and give the case full and fair consideration by talking it out, each juror expressing himself or herself about the facts of the case, and each juror listening to the thoughts of the other jurors, so that when you come to an agreement by verdict. the verdict will actually be a true agreement and you will all feel the [1461] way that that verdict stands.

Now, I have no idea what that verdict would be. If I were deciding this case I would have to take it under submission. It is not one of those that is so

obvious either way that you can simply announce a decision right off.

Most of these instructions will be read. An occasional one, such as that just given, will be oral. But it makes no difference, they are all instructions to the jury from the court and are to be followed as the law.

There are some things in law with which we deal with such frequency that a judge has the rule firmly in mind and can simply recite it from memory. There are others that are not so firmly in mind and I will have to read those to you. There are also some in which the attorneys have asked that particular language be used and, of course, I haven't undertaken to memorize them. I will simply read the language upon which there has either been agreement or been a request upheld in favor of one or the other. But they are all instructions of the court and each one is to be considered with the others. Don't single out any one and act on it alone, but treat the instructions as a whole.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof [1462] as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible.

In a civil action such as the one which has just been tried, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring his side of the ques-

tion is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue, the probability of truth favors that party.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or [1463] facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

Any manufacturer, such as The Flintkote Company, has a right to select its own customers. It has a right generally to conduct its business in whatever way it determines.

However, the case here is one in which The Flintkote Company is accused of being a member of a conspiracy. The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the antitrust laws it cannot do so if there has been a conspiracy.

The plaintiffs have filed a complaint against the defendant, accusing it and others of a conspiracy. I will not read the entire Complaint, but I will read what we call the charging language of the Complaint, which sets forth just what it is that is supposed to be the heart of the thing which Flintkote allegedly did and which it is claimed was wrong.

"Beginning at an exact date unknown to plaintiffs, but prior to the year 1951, and [1464] continuously thereafter up to and including the date of the filing of the Complaint herein, have conspired to restrain and have restrained trade and commerce in the interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, State of California, by contracting, combining, and conspiring with each other and with other manufacturers of acoustical tile, in restraint of said trade and commerce, and have thereby substantially lessened, limited, and destroyed competition in said trade and commerce and have prevented plaintiffs from receiving acoustical tile with which to compete in said trade and commerce.

"Commencing at an exact date unknown to plaintiffs, but prior to the year 1951, and continuously thereafter up to and including the date of the filing of the Complaint herein, the defendants well knowing all of the facts herein alleged, have attempted to monopolize and have monopolized the trade and commerce in interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, contrary to Section 2 of the Act of Congress commonly known as the Sherman Act. [1465]

"Said combinations, agreements, conspiracies, monopolies, and attempts to monopolize have, during all of said period of time tended to restrain and monopolize and have in fact restrained and monopolized trade and commerce in acoustical tile in interstate and foreign commerce.

"Among the objects and purposes of the illegal restraints and monopolies alleged herein were and are the following:

"a. To maintain and adhere to and perpetuate non-competitive prices and terms and conditions of purchase of acoustical tile from manufacturers by acoustical tile contractors in the Counties of Los Angeles and San Bernardino, and to protect and perpetuate the existing non-competitive price fixing and business allocation scheme and device and agreement existing among acoustical tile contractors in said areas.

"b. To eliminate all or substantially all competition in the sale and installation of acoustical tile in public and private construction works in the Coun-

ties of Los Angeles and San Bernardino and elsewhere in the State of California. [1466]

"c. To preserve and perpetuate the existing agreement and plan adhered to by acoustical tile contractors whereby the sale and installation of acoustical tile mentioned and described in paragraphs a and b above would be allocated among members of the defendant, The Association, at non-competitive exorbitant and high fixed prices and upon other fixed and non-competitive conditions of sale rather than pursuant to open and competitive bids and negotiations among all acoustical tile contractors doing business in said areas.

"d. To exclude competing acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile, in Los Angeles and surrounding areas, with the defendant acoustical tile contractors named herein.

"e. To obtain a practical control and monopoly over the purchase, sale, and installation of acoustical tile in public and private buildings in the Counties of Los Angeles and San Bernardino in the State of California and elsewhere in said state. [1467]

"f. To obtain maximum exorbitant and non-competitive profits in the sale and installation of acoustical tile for use in public and private buildings in the Counties of Los Angeles and San Bernardino, State of California, and elsewhere in the State of California by the defendant acoustical tile contractors named herein.

"g. To deprive the public generally of the benefits of a competitive market in the expenditure of

public and private funds for schools, hospitals, offices, and other types of public and private building construction."

Now, you have noted, as I read that, that I mentioned the defendants, but there is only one defendant here. This Complaint, upon which the case is tried and from which I have just read to you, was filed against many defendants. What has happened in the case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant.

The defendants, however, are L. D. Reeder Co. of San Diego; R. E. Howard Company; The Harold E. Shugart Company, Inc.; R. W. Downer Company; Coast Insulating Products; A. D. Hoppe, doing business under the fictitious name and style of The Sound Control Company; The Paul H. Denton Co.; Acoustics, [1468] Inc.; L. E. Reeder; R. E. Howard; G. H. Morris; Roy Downer, Jr.; Carroll Duncan; Charles L. Newport; Gustave Krause; Paul H. Denton; Acoustical Contractors Association of Southern California, Inc.; The Flintkote Company. It is charged in the Complaint that these defendants conspired, among themselves and with others, to violate the Sherman Act.

Now, a conspiracy is an unlawful agreement to accomplish an unlawful purpose, and after the making of that agreement the doing of some act or acts to further that purpose.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlaw-

ful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the exact means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the [1469] defendants may be found to have engaged in such it must be shown that they were active in attempting to further the ends of the conspiracy.

Each party to the conspiracy must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or

scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

Where the existence of a conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance [1470] of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with a rational conclusion otherwise.

This brings us to the legal proposition that while any manufacturer, such as The Flintkote Company, would be privileged, acting entirely independently and as a private matter between itself and a proposed customer, to say to a person or firm, "We will not deal with you."

That if The Flintkote Company acted in concert

with any one or more of the other defendants here, and the acting in concert was in violation of the law, which I will now read to you, then the conspiracy would be made out.

The law which I said I would read to you is a portion of the Sherman Act, which is one of the very old laws of the United States. It goes back to the time when all of us were babes in arms. The pertinent portion of it reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of [1471] trade or commerce among the several states, or with foreign nations is declared to be illegal:

* * *

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the United States"

is in violation of this law.

Now, that ends the exact reading from that portion of the statute.

In this connection the court instructs you, as a matter of law, the course and conduct of a business which involves a regular exchange and distribution of acoustical tile for manufacturing plants located without the State of California, to and into the State of California, to acoustical tile contractors is a business engaged in interstate commerce and is subject to and within the purview of the antitrust laws, including the Sherman Act, a portion of which I have just read to you.

Another portion of the Sherman Act—again reading the law itself—reads this way:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in [1472] which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained * * *"

Now I will depart from the exact language of the statute again:

"The purpose of the antitrust laws is to preserve the freedom of interstate and foreign trade and to secure unrestricted equality to engage in such trade and to protect the public against the evils incident to the destruction of competition, by striking down combinations which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade, or which may tend directly to suppress competition therein.

"You are instructed that a restraint of trade, within the meaning of the antitrust statutes means a restraint of competition. A restraint of interstate trade or commerce is unlawful if it is the result of an intent to monopolize or a monopoly or is created by reason of a contract, combination or conspiracy between two or more people or corporations. It is not necessary for a restraint to be illegal, that it should suppress all competition. A direct restraint of any part of the interstate [1473] commerce and trade is sufficient. A restraint, therefore, directly

affecting plaintiffs' ability or right to compete in the purchase, installation or sale of acoustical tile would be sufficient under the statute. Commerce is restrained if competition is hindered, obstructed, injured or prevented. An essential characteristic of a monopoly is a wrongful exclusion of competitors from the field."

You will note that the language here is "an essential characteristic."

"Monopoly is actually the concentration of business in the hands of a very few to such an extent that competition is thereby directly restrained.

"Every person is presumed to know the natural and probable results of his or its acts knowingly done, and an unlawful act implies an unlawful intent. If a defendant knowingly did acts which the law renders illegal, then, he is guilty, irrespective of whether he knew he was violating the law.

"The elimination of competition in interstate commerce by a corporation or by a combination or group of corporations, or competitors, controlling a substantial part of the acoustical tile industry, is an undue, unreasonable and illegal restraint under the Sherman Act, if those parties act in concert [1474] by conspiracy, without regard to any economic or financial reasons or advantages derived by the combination or group individually or collectively from such action.

"It is not a question as to what extent competition was affected nor is it a question how reasonable or unreasonable from an economic point of view the restraint of competition may have been. What the

law condemns is the power and exercise of such power on the part of an organized group to eliminate competition, and for that reason the law condemns and brands as illegal all attempts to eliminate competition by an organized group, such as has been hypothetically described here."

It is for you to determine whether the evidence shows the existence of such a group or whether it fails to show that fact.

"The law condemns the exercise or the intent to exercise by any person or by combination or group of two or more persons to eliminate competition among or between acoustical tile contractors, so, as I have stated, if you find such a combination or group and the members of the same had the power to eliminate competition and acted together for that purpose, then I charge you that the [1475] combination is illegal and your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein.

"In deciding whether such a combination as I have described existed, you must consider all the facts and circumstances and all of the evidence of the case as a whole.

"If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly

that plaintiffs were damaged by such acts and conduct."

The evidence in this case is without conflict on one particular point that is essential in an antitrust case, because the antitrust law is a national law and not the law of the particular state in which business is transacted, and that is, that interstate commerce was involved, in that the product was manufactured in the Hawaiian Islands and thereafter marketed in the United States.

"A primary question for you to consider is whether defendant Flintkote Company was a party to [1476] an unlawful contract, combination or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce. If you find that no such unlawful combination or conspiracy existed or that The Flintkote Company was not a party to any such combination or conspiracy, even if one did exist among others, you must return a verdict for the defendant and you need not consider any other questions."

In other words, one of the primary questions here is, was there a conspiracy, and if there was, was the defendant on trial today a member of that conspiracy or was it acting independently of whatever the conspirators might have been doing?

"If you find that the defendant, The Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors, named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed this would be a violation of the law

and if you find that this violation resulted in damage to the plaintiffs' business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged.

"The Flintkote Company can be liable for [1477] refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination or conspiracy."

In other words, we come back to the old principle that if The Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action.

"You may not use any admission made outside of court by members of the alleged conspiracy for purposes of determining whether The Flintkote Company was a member of an unlawful conspiracy, unless The Flintkote Company through its agents was present when the statement was made and the agent or agents so conducted himself or themselves as to signify agreement with the statements or declarations.

"If you conclude, however, from the evidence that The Flintkote Company was a member of the unlawful conspiracy, you may then consider as if made by said company any statements or declarations of other members of such conspiracy, provided such statements were made during the existence of the conspiracy and in furtherance of an object or purpose of the particular conspiracy.

"The defendant The Flintkote Company [1478]

is a corporation and as such acts only through its agents."

We are all natural persons, you in the jury box and I here; we are natural persons. But a corporation is an artificial person. It is really a concept of law, which applies to a particular form of legal organization, and it is called throughout the law an artificial person. It can only act through actual or real persons or its agents in the type of thing which is involved in this lawsuit.

And a conspiracy cannot exist between a corporation and its own employees or agents, acting in such capacity. In other words, if the corporation is an artificial person, it has to act through its officers and employees, and insofar as they act within their capacity, as such, to accomplish the purposes of the corporation, doing it only as officers and agents of the particular corporation, they are not to be deemed as conspiring because they are attempting to carry out the purpose of the particular corporation. Accordingly, you may not base a finding of conspiracy merely upon any concert of action solely among the agents and employees of The Flintkote Company.

"You cannot find that The Flintkote Company was engaged in an unlawful transaction, combination or conspiracy solely on the basis of the fact that The Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs. You can so [1479] find only if there is other evidence of a substantial nature which furnishes a

valid basis from which the alleged fact of such unlawful conduct may be reasonably inferred.

"Before you can conclude that a combination, agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is to substantially lessen, hinder or suppress competition into the channels of trade or commerce or to monopolize trade or commerce with respect to the commodity here involved.

"Before plaintiffs are entitled to recover damages for violation of the antitrust laws they must prove some appreciable harm to the general public in the form of undue or unreasonable restriction of trade and commerce, as a result of a wrongful contract, combination or conspiracy or monopoly or attempt to monopolize.

"The general public's interests have not been injured, within the meaning of the law, unless the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available to [1480] the channels of commerce or some substantial consequence to the free flow of that commodity in commerce if you find certain persons connected with this case acted in a similar manner, with knowledge that other persons were so acting, you are permitted to consider such conscious parallel action as some evidence that that person contracted, combined or conspired so to act. But conscious parallel business behavior is not in itself a violation of

the antitrust laws and does not necessarily show an agreement among the persons so acting. Similarity of action may be the result, not of previous agreement, but of solving a similar situation in a similar manner. The crucial question for determination in connection with conscious parallel behavior is whether it stemmed from independent decision or from agreement, either tacit or expressed."

Now, you note that the court has directed your attention to the fact that there must be some effect upon the general public interest, which is to have free commerce and trade upon a competitive basis.

However, the public, through its attorneys, federal attorneys, may prosecute such actions in the criminal courts or take action to restrain. This is not such an action. This [1481] is an action in which these particular plaintiffs say that they were injured and, as you will recall from an earlier instruction, any person or firm which has been injured by the action in concert and conspiracy of others, acting in violation of the Sherman Act, is entitled to collect damages suffered by the persons who have been so affected.

This means, in a practical way for you, that if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, then even so you cannot undertake to punish it. Your duty is not, if you find that the plaintiffs are right, to take steps to bring about punishment or redressment of the injury which the public suffered, but instead will be to compensate the plaintiffs for the loss which they have sustained.

That means that if you find for the plaintiffs you cannot take any idea of punishment into consideration.

Some of you might have sat in cases in which a court has said if you find that a defendant did a particular act—and, of course, judges never say or shouldn't say that a defendant has or that a defendant has not done a particular act. That being a question of fact, they leave it for the decision of the jury, as to whether the acts alleged have been proved.

But if they have been proved, in certain types of cases a judge will say to the jury—and the law gives him ample [1482] basis in certain types of cases to say it—"You may add a sum of money in order to make an example of this defendant, so that others will be deterred, and in order to punish this defendant because of the wilful, wrongful nature of its acts."

This is not such a case. In your consideration of the antitrust laws you are not, even if you find a verdict in favor of the plaintiffs, to take into consideration any element of punishment, or what some people call "smart money," to make a defendant smart under the lash of law enforcement.

If you find for these plaintiffs your finding must be limited only to finding the actual damages which the plaintiffs have suffered, and, of course, you can only do that if you first find there was the particular type of conspiracy which has been described in these instructions, for that is the type which is charged. If you find there was, you must find it from the

evidence, either the circumstantial evidence or the direct evidence.

You must find, in addition to that, before you can find for plaintiffs, that the defendant on trial here, The Flintkote Company, was an actual participant in the conspiracy and was not acting independently of the conspiracy and its own interest, acting alone.

One of the attorneys wrote this out for me. I see he did it in much shorter language than I gave you when I got to simply talking about it. [1483]

"The plaintiff in an antitrust action can recover damages only for injury to his business or property, which does not include damages for embarrassment, humiliation, disappointment or other matters of a personal nature or by way of punishment."

If the defendant has acted as has been charged here, so that the defendant would be responsible to the plaintiffs, under these instructions, the defendant would be what is called in law a tort feasor. Tort is an old French word. It comes from the same root word as torture. It means generally that a wrong that is not a breach of contract, but a wrong of some kind.

"A tort feasor is liable for all consequences naturally resulting, all injuries flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. Recoverable damages therefor include compensation for all injury to plaintiffs' business arising from wrongful acts committed by defendant, provided such injury was the natural and proximate result of the wrongful acts."

You notice I said "proximate result." I didn't say "approximate." Approximate means about or almost. Proximate means direct and exact. [1484]

"This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. These are governing principles applying to compensatory damages, whether damages be compensatory or exemplary. Their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts."

You should examine, if you find that this is a case for damages, the evidence which has been introduced respecting damages. Bear in mind, if you find damages, that the damages would be limited to compensation for injury to plaintiffs' business arising from the acts of the defendant, providing such injury was the natural and proximate result of the acts. This may include injury to business standing or good will, to a loss of business which would otherwise have been enjoyed by the plaintiffs, to additional expenses incurred because of the tort, and other elements of injury to the business.

I have read here that they cannot be governed or measured by any precise yardstick, meaning by that that you just can't take an adding machine and go into the jury room and add up various items which have been mentioned here, but there must be a finding that the damage actually resulted. [1485]

I had another instruction one of the counsel handed me on damages only this morning, and which I carried up to the bench with me here and have misplaced it.

Mr. Doty: Here is an extra one.

The Court: Do you have a copy? I will either use yours or Mr. Ackerson's, if you have one.

Mr. Ackerson: Yes, I have a copy of that, your Honor. I don't think either of them should be given, however.

The Court: "Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to the time of the beginning of this trial."

There have been contradictions in the testimony of witnesses. Now, in this matter you will recall that the court has said, "He who asserts the affirmative of a matter must produce a preponderance of evidence."

The preponderance of evidence doesn't simply mean a greater number of witnesses, because one witness, who carries conviction and force in your careful analytical mind, might outweigh a number of witnesses whose approach to a problem or to the particular subject might be thought by you to be either frivolous or unconsidered or not truthful. It doesn't mean you add up the number of witnesses, but you compare the [1486] force and value of the testimony.

The person who asserts the affirmative on the case has to have a preponderance of evidence, which means there must be a little more evidence, at least a little more evidence on his side than on the other side, because if you find that it is evenly balanced, then the decision goes to the one who resists the case, not the one who is trying to establish the affirmative.

Witnesses are presumed to speak the truth. They come here to the witness stand, are sworn to tell the truth and it is presumed they will stand by their oath. In a case where one says one thing and another contradicts that, either directly or by stating facts which, as a mass of facts, would contradict it, the jury has to determine where the truth lies. In doing that you may consider the relationship of the witness to the case, what he has to gain or lose, what interest he has either personal or as an employee.

You may determine whether he was dealt with fairly by counsel or whether he was not, determine his quality of intelligence. Does he have a good memory or does he not have? Can you rely generally on his testimony? Is it such that you would be willing to rely on it in serious affairs of your own? Does he have a disposition to tell the truth or is he evasive or have a disposition to speak an untruth?

You may consider whether at other times and places he [1487] has stated things in contradiction to what he has stated here. And if that should appear to be the circumstance, consider the circumstances under which both statements were made,

the statement made here and the statement made at the other time and place.

It takes 12 of your number to agree upon a verdict. When you retire to the jury room, elect one of your number foreman and that foreman will preside over your deliberations, and he will see to it that each member of the jury gets to have his or her part in the discussion, that you all have the benefit of the views of the others.

And if you can arrive at a verdict, the foreman will reduce that verdict to writing on forms which the bailiff will hand you, and you will then return to court when that verdict is unanimous. But it must be unanimous, it must be all 12 of you.

Now, counsel, the court will hear your exceptions to the charge.

This is a duty that the law imposes upon the attorneys and upon the court. After the judge has instructed the jury, which, as you have observed, is a moderately lengthy process, and always subject to the possibility that the judge has overlooked something or has had a slip of the tongue, the attorneys may step around to the side of the bench, out of the hearing of the jury, and point out to me what they think [1488] my errors have been, and may suggest ways in which the instructions should be extended.

You may do that now.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury.)

Mr. Doty: For the record, I think we should have our 14 new on burden of proof, which said that the plaintiff has the burden of proof on all issues, and that in the event he does not sustain the burden of proof, they are to find for the defendant. I don't think that was ever stated.

The Court: There were many instructions submitted on that particular issue. I selected one and did not wish to repeat.

Mr. Doty: We believe that our instructions 46-A through 46-F should be given. It is on an entirely different theory of damages from the one stated, but, for the record, we would like to insist that they be given.

The Court: The insistence is noted and I have given them as far as I feel that I properly can.

Mr. Doty: I take it that it is sufficient if we specify 46-A through 46-F, without specifying which is new, because, obviously, we only want the latest version of those.

The Court: The court will protect you by saying that I understand the exception and I deliberately and knowingly decline to give all the instructions just mentioned. [1489]

Mr. Doty: We also had an instruction 45 new, which was an additional instruction in connection with damages based on speculation and guesswork, which we feel should be given.

The Court: I had your instruction before me, but I thought a little extemporaneous one would tell them a little better. Do you think I missed it?

Mr. Doty: I don't think you got in the speculation and guesswork aspect of the thing.

Mr. Black: I think that is sound, your Honor. You don't have to be precise, but you just can't pull a figure out of the air.

The Court: I will read it. Hand me that.

Mr. Black: One other observation. I think it is more a matter of confusion than error. In one of the old instructions there were several defendants in the case, which was given, that stated the jury can bring in a verdict against any defendant they find guilty, which is inappropriate in this action. It might tend to confuse. I think that was inadvertently given that way.

The Court: I think I was reading Judge James' instruction at the time.

Mr. Ackerson: That was one of the suggestions I had, was, your Honor, I think we talked this over in chambers before, and I think you ought to give an instruction or a little clarification about the fact, in connection with the suggestion [1490] of Mr. Black's, that the fact of settlement, which has been mentioned to the jury, for income taxes or anything else, should not be taken into consideration any wise by them. They are still to return the same verdict they would otherwise.

Mr. Black: I think that has been adequately covered.

Mr. Doty: I think that has been adequately covered.

The Court: I don't recall that settlement has been mentioned.

Mr. Ackerson: Yes.

Mr. Black: It was by you at the outset, at the beginning of the trial. We agreed you would instruct it had been made. I don't think we need to repeat that.

Mr. Ackerson: They should take no consideration of that. I think that ought to be said now. It has been mentioned to them, but they should eliminate it from their minds and proceed as if it hadn't.

Mr. Doty: There is no sense in calling it back to their minds to eliminate. We told them at the outset to eliminate it from their minds.

Mr. Ackerson: I don't care.

Mr. Black: We might as well let it alone.

Mr. Ackerson: That is all I have. I have no other suggestion. I think you gave a very brief charge, but I can't think of anything you missed. [1491]

Mr. Doty: I noted our 42 we thought should be given.

The Court: I understood that was in the series.

(Whereupon, the following proceedings were had in the presence and hearing of the jury.)

The Court: I overlooked one I had agreed with the attorneys to give.

"The damages, if any, which you may award plaintiffs are not to be based on speculation or guesswork. Damages which you may award plaintiffs are to be just and reasonable and must be based only on such relevant factual data, if any, as was placed in evidence in this case."

The giving of this instruction is not to be taken

by you as an indication that the court believes you should give any nor is my cautionary remark to be taken as an indication that I believe you shouldn't.

I am not expressing myself. I don't know who should win this case, and, hence, anything which might indicate to you a state of mind on my part, as to who should win, would be an erroneous interpretation by you, because I haven't figured it out. That is for you to do, and I have had enough problems here to figure out the things that are within my province.

Mr. Ackerson: Your Honor, I don't believe that last instruction is confusing, but the thought just occurred to me, with all due respect, that you may not speculate without telling [1492] the jury what latitude and leeway they may have, which does not constitute speculation. I don't want the jury to have the inference they have to be able to sit down and figure the amount of damage, if they so find, down to the penny or the dollar. They can use their best judgment, based on the evidence that is in the record.

The Court: In the nature of things, if a plaintiff wins in a case of this kind it is impossible, as I told you before, for you to have the data in a case of this kind from which you could take an adding machine and add up the damages with minute exactness.

But you must find some basis in the evidence for any damage which you award, and don't just, as one of the attorneys said here at the bench, draw a figure out of a hat.

Does that satisfy you, Mr. Ackerson?

Mr. Ackerson: Yes, your Honor.

The Court: All right. Mr. Black, you can come up here if you——

Mr. Black: I am satisfied on that point.

The Court: Either of you may come up here and state privately any further amplification you think should be given.

All right. The clerk will swear the bailiff.

May I say counsel have both tried their cases very well, and with due regard for all the proprieties.

Mr. Ackerson: Does your Honor intend to have the alternates [1493] sit through the case? I don't know what your practice is. To sit through the deliberations?

The Court: In view of some decisions in the courts of California an alternate may be sent into the jury room if a juror becomes incapacitated during deliberations.

I had intended to have the alternates stand by. They may go to their homes, unless you have some objection.

Mr. Ackerson: I think it was a slip of your mind, your Honor. I wasn't suggesting anything.

The Court: Swear the bailiff.

(Whereupon, the bailiff was duly sworn by the clerk.)

The Court: Now, is there any one of the 12 who feels unable to go forward with deliberations?

(No response.)

The Court: The jury proper may retire. The alternates will remain.

(Whereupon, the jury proper retired to deliberate.)

The Court: I have always had the impression that if the alternates were not needed by the time the jury retired, that the alternates should be discharged, and I have been discharging them and so have the other judges here.

I noticed the other day that in a state court action that an alternate was sent in to replace a juror who became ill during the deliberations.

I called the judge and he said, "Oh, we have a lot of [1494] authority in California for that. We do it all the time."

So perhaps we had better keep these jurors available and just trust that we do not have to cross the bridge which has just been alluded to.

Mr. Ackerson: I think that is a good idea.

Mr. Black: Yes, I think that is good sense.

The Court: Do you have any objection to their going home or wherever they wish to go, simply requiring them to leave with the clerk a note of where they might be phoned?

Mr. Ackerson: I think that is practical.

Mr. Black: That is a good suggestion.

The Court: Will you please leave with the clerk your telephone numbers and then you will be excused from further attendance unless called? We will let you know when the verdict comes in, so that you will not be restrained longer.

(Whereupon, at 9:50 o'clock a.m., a recess was taken until 3:45 o'clock p.m. of the same day.) [1495]

Thursday, May 26, 1955—3:45 P.M.

(Thereupon, the jury returned to the courtroom.)

The Court: In the case of Lysfjord against Flintkote, the jury has returned to the courtroom, having sent me a note at 3:30 that they have arrived at a verdict.

Mr. Foreman, do you have the verdict?

The Foreman: We have, your Honor.

The Court: Is it the unanimous verdict of all of you?

The Foreman: It is, sir.

The Court: All right. Will you read it, please?

The Foreman: Just the part down below, your Honor?

The Court: Yes.

The Foreman: "We, the jury in the above-entitled cause, find in favor of the plaintiffs, Elmer Lysfjord and Walter R. Waldron, and against the defendant, The Flintkote Company, and assess plaintiffs' damages in the amount of $50,000.00."

The Court: Mr. Bailiff, will you bring the verdict to the clerk, and the clerk will poll the jury?

Mr. Clerk: Mr. McDaniel, is this your verdict as presented and read?

Juror McDaniel: It is.

The Clerk: Mr. Scritsmier, is this your verdict as presented and read? [1496]

Juror Scritsmier: Yes, sir.

The Clerk: Mr. Nittinger, is this your verdict as presented and read?

Juror Nittinger: It is.

The Clerk: Mr. Fitzpatrick, is this your verdict as presented and read?

Juror Fitzpatrick: Yes, sir.

The Clerk: Miss Gibbs, is this your verdict as presented and read?

Juror Gibbs: Yes, it is.

The Clerk: Mr. Sax, is this your verdict as presented and read?

Juror Sax: It is.

The Clerk: Mrs. Bird, is this your verdict as presented and read?

Juror Bird: It is.

The Clerk: Mrs. Lindgren, is this your verdict as presented and read?

Juror Lindgren: It is.

The Clerk: Mr. McClure, is this your verdict as presented and read?

Juror McClure: It is.

The Clerk: Mrs. Marfort, is this your verdict as presented and read?

Juror Marfort: Yes, it is. [1497]

The Clerk: Mrs. Strangman, is this your verdict as presented and read?

Juror Strangman: It is.

The Clerk: Mr. Osborne, is this your verdict as presented and read?

Juror Osborne: Yes.

The Court: This matter of polling the jury is the law's way of finding out for certain whether you are in unanimous agreement, so we have to do it unless there be some waiver, which is very unusual.

Thank you, members of the jury, for your careful attention to this case. It was a long trial, and it had its tedious aspects, but it was an important case, and I am sure you have given it careful consideration.

Thank you for your services. You are now excused until the clerk notifies you of another date on which to return.

(Thereupon, the jury retired from the courtroom.)

The Court: Counsel, the court is engaged, as you have noted, in the trial of another case, so I think the further matters in consideration of your case had better be brought up on a motion day.

Mr. Black: Very well, your Honor.

Mr. Ackerson: Could that be next Monday, your Honor?

The Court: Well, next Monday is a holiday.

Mr. Ackerson: Oh, I forgot about that. [1498]

The Court: Let me have the clerk get in touch with you. We will find a half-day or a day in which to take care of it at as early a date as I can arrange. Our calendar is pretty congested at the moment, but there are some uncertainties in it, and as soon as I can resolve those uncertainties, I will have him do that.

Mr. Ackerson: Very well.

The Court: Is that agreeable?
Mr. Black: Yes, it is.
Mr. Ackerson: Yes, your Honor.
The Court: Very well. [1499]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of June, A.D. 1955.

/s/ VIRGINIA K. WRIGHT,
Official Reporter;

/s/ AGNAR WAHLBERG,
Official Reporter;

/s/ MARIE G. ZELLNER,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 203, inclusive, contain the original:

Complaint;

First Amended Complaint;

Answer of the Flintkote Co., to First Amended Complaint;

Defendant's Proposed Jury Instructions;

Motion to Separate Legal and Equitable Issues for Trial;

Memo of Points & Authorities on Effect of "Covenant," etc.;

Defendant's Proposed Jury Instructions: Revisions & Withdrawals;

Defendant's Instruction 12, etc. (See Nunc Pro Tunc Order);

Substituted Jury Instruction No. 26 (See Nunc Pro Tunc Order);

Verdict;

Motion for Judgment N.O.V. and for New Trial;

Petition for Attorney's Fees and Costs;

Stipulation;

Memo of Points & Authorities Regarding Attorney's Fees, etc.;

Memo of Decision;

Memo Re: Attorney Fees;

Judgment;

Bill of Costs;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Contents of Record on Appeal;

Plaintiffs-Appelles' Designation of Additional Record;

Stipulation & Order Extending Time to File Record;

Order for Filing Nunc Pro Tunc;

Defendant's Proposed Jury Instructions: Additional Instructions and a full, true and correct copy of the Minutes of the Court on July 8, 1955, and a full, true and correct copy of the Supersedeas Bond, in the above-entitled cause; a photostatic copy of all docket entries; 17 vols. of reporter's transcript; plantiffs' exhibits 1 through 49, except exhibit 42 which was withdrawn by stipulation & order thereon; and defendant's exhibits A through M, inclusive, all in the above-entitled cause constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00 which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 20th day of January, 1956.

[Seal] /s/ JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15005. United States Court of Appeals for the Ninth Circuit. The Flintkote Company, a Corporation, Appellant, vs. Elmer Lysfjord and Walter R. Waldron, Doing Business as aabeta co., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15005

THE FLINTKOTE COMPANY,
Appellant,

vs.

ELMER LYSFJORD, et al.,
Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Pursuant to Local Rule 17, subdivision 6, appellant The Flintkote Company states that it intends to rely upon each and all of the points set forth in its "Statement of Points on Appeal" filed in the District Court of The United States, Southern District of California, Central Division, on December 20, 1955, and constituting pages 188 through 190, inclusive, of the Record on Appeal in this appeal, and appellant The Flintkote Company hereby adopts said "Statement of Points on Appeal" as its statement of points on which appellant intends to rely as required by said Rule.

McCUTCHEN, BLACK,
HARNAGEL & GREENE,
HAROLD A. BLACK,
G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Appellant The Flintkote Company.

Affidavit of service by mail attached.
[Endorsed]: Filed February 2, 1955.